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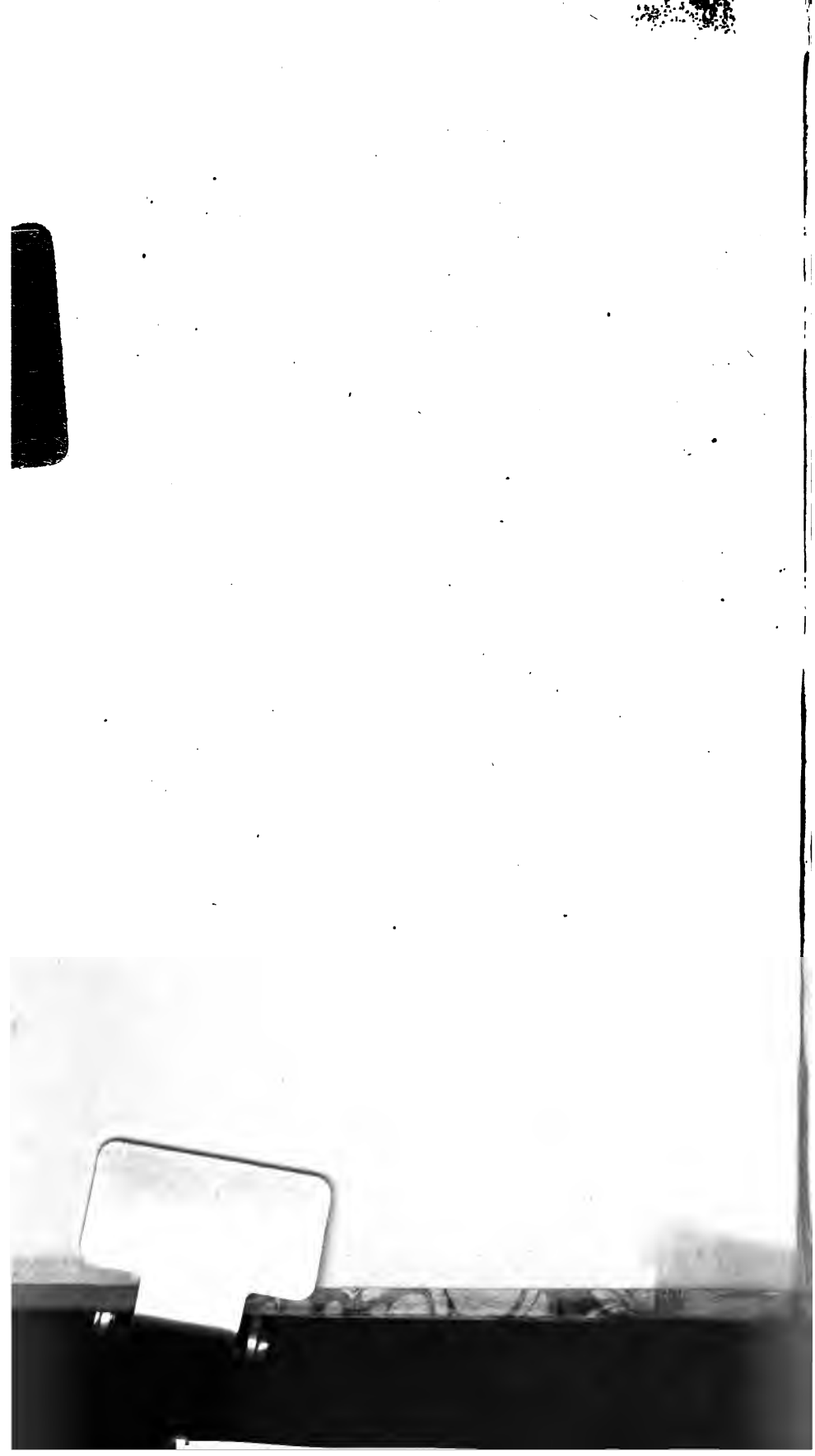
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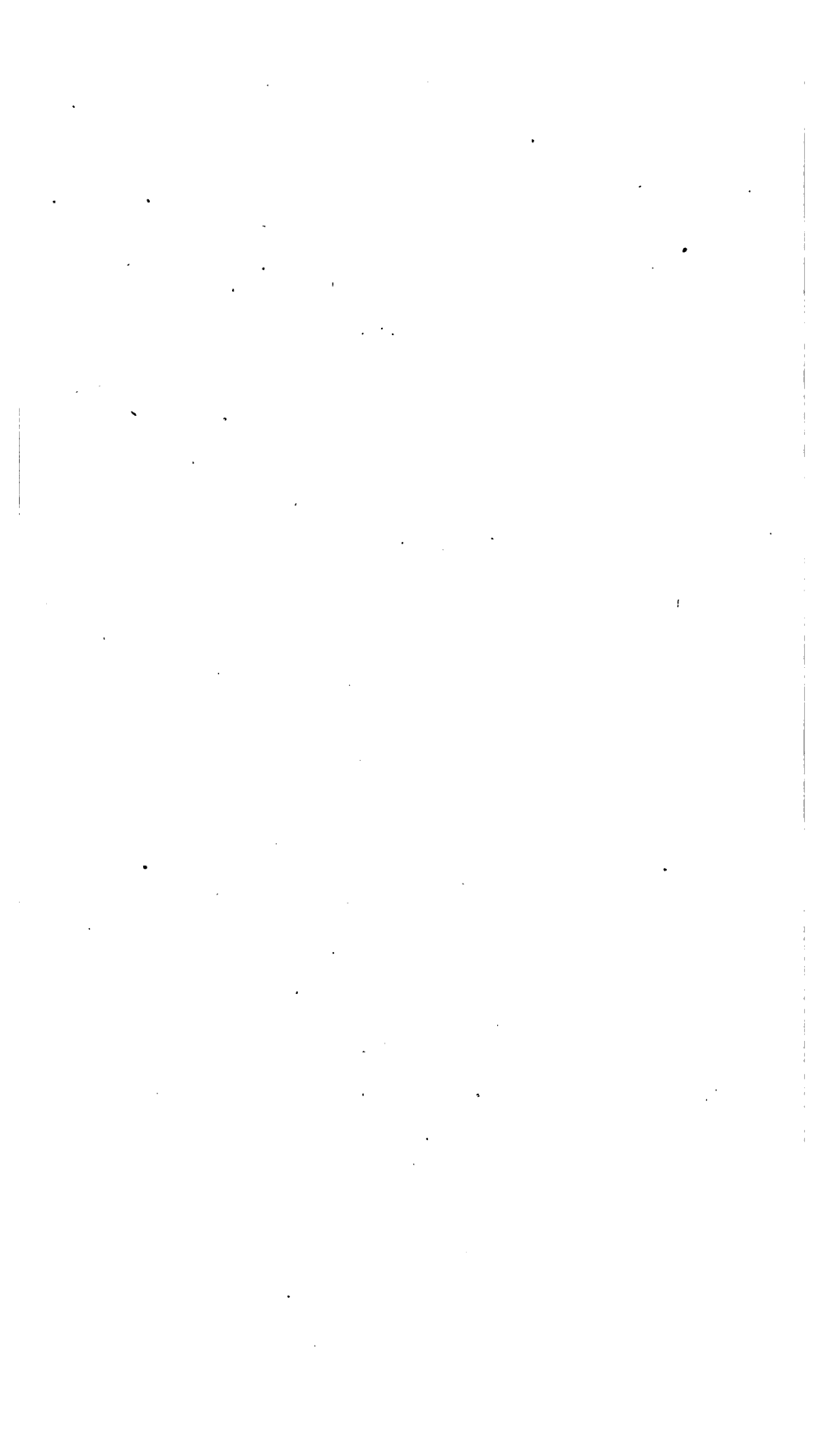
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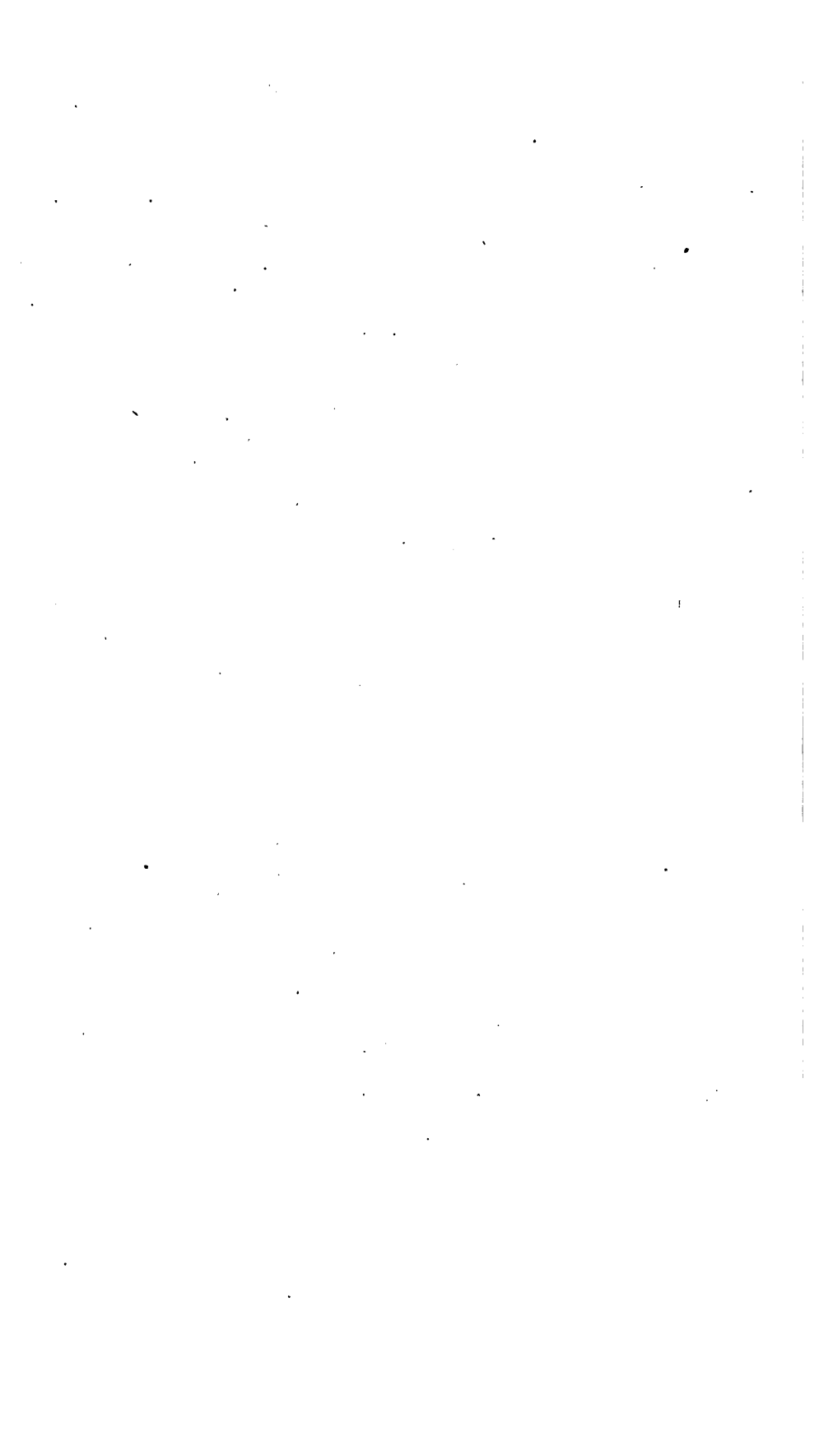
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No. IX.

ART. I.—SIR WILLIAM HENRY MAULE.

THIS accomplished lawyer, and eminent judge, died at his residence in Hyde Park Gardens, on the 16th of January last, after a few days' illness, in the seventieth year of his age. In fulfilment of the promise made in our last number, we now offer a memoir of his career.

Sir W. H. Maule was born on the 25th of April, 1788, at Edmonton, in Middlesex, where his father was a medical practitioner of good standing and consideration. His mother was a Rawson, of a family which we believe still flourishes in Leeds and its neighbourhood. The late Mr. Miller, member in several successive Parliaments for Newcastle-under-Lyme, and well known in his day to the collectors of bibliographical curiosities, as one of the keenest and most learned of their fraternity, was his first cousin by the mother's side. His paternal grandfather had been rector of Castle Ashby, near Northampton. A tradition, whether historical or mythical it may be difficult to decide, makes these English Maules an offshoot from the great Scottish family of Maule of Panmure. His earliest education was such as could be got in the neighbourhood. At the age of eleven, having then some rudiments of Latin, but no Greek, or, as he himself phrased it, knowing his *hic, hæc, hoc*, but not his *ί, η, ρά*,

he was taken charge of by his father's brother, an ex-fellow of King's College, Cambridge, and rector of Great Greenford, near Ealing, who combined with his clerical duties the care of a few pupils, and under whom, by the way, he had for a schoolfellow the late Lord Durham. From his uncle's death, which took place in his seventeenth year, his preparation for Cambridge was entirely his own work; how efficiently carried on may be estimated from the fact that, on his commencing residence there, he was at once transferred to the lecture-room of the second year. An anecdote from this interval between school and college is worth preserving, as exhibiting in early life that aptitude for humorous turn of thought which was afterwards so remarkable in him. In a letter to his father, giving an account of a journey of some length which he had made on horseback, he relates how his pony had shied at a waggon of hay:—"I thought it very strange," he goes on to say, "for a horse to be frightened at a load of hay, till I remembered having seen people frightened at a drove of oxen who had no objection to a dinner of beef."

At Cambridge, where he commenced residence at Trinity College in October, 1806, and graduated in due course in 1810, his career was a brilliant one. He was senior wrangler, it might almost be said, without a second; for the semiofficial rumour which is apt to be current on such occasions, stated the marks obtained by the two first wranglers at 1600 and 900 respectively, and this though the second (Mr. Brandreth, since of the Northern circuit, who was also senior medallist, the highest honour in classics) would, it was acknowledged, have made a highly respectable first in any ordinary year. We may observe that, however incredible so great a disproportion may appear, yet both the external authenticity and intrinsic probability of the statement are guaranteed to us by the channel through which we have received it. The year was a fortunate one: on its list of honours stand several other names which have since been heard of in the world, as those of Mr. Baron Platt; Dr. Musgrave, Archbishop of York; Dr. Mountain, Bishop of Quebec; Mr. Duckworth, M.P. for Leicester, and Master in Chancery; and Mr. Bonham Carter, M.P. for Portsmouth, long a public cha-

acter as Sir R. Peel's parliamentary whipper-in. The last-named gentleman may claim a special mention here, as the only person who could boast of having beaten the subject of our memoir in an examination—it was in the college examination which takes place at the close of the first academical year, upon the subjects of the past year's lectures, the result of which, on this occasion, gave Carter first, Maule second. In every other competition which the latter entered into, he held the first place; and those who know Cambridge need not be informed that, from the nature of that examination, a careful getting up for the nonce of collateral information on the given classical subjects (technically called *cram*), will often carry the day against a great superiority of real knowledge. This success, however, brilliant as it was, by no means measured his scientific attainments. He had not merely followed out to the uttermost the mathematical studies of the place, but had gone beyond them, and, so to say, behind the scenes. He had made himself acquainted with the whole range of the science, both in its history and in its most advanced state—with the writings of Euler, the Bernouillis, and others, who had made it what it then was—with those of the great continental mathematicians, such as Laplace and Lagrange, who were making it what it now is. And to all this was added an amount of classical scholarship, which induced his friends to urge his presenting himself as a candidate for one of the two medals each year given for proficiency in that branch of study, a competition, however, into which he did not enter.

Upon obtaining his degree, Mr. Maule did not immediately leave Cambridge, but stayed on there for some time, taking pupils and awaiting a fellowship, to which he was chosen at the election of October, 1811, the earliest at which he was admissible as a candidate. Among his pupils were two who have since achieved eminence in the same profession with himself, Sir Edward Ryan, late Chief-Justice of Bengal, and now one of the most active members of the Judicial Committee of the Privy Council, and the present Judge-Ordinary of the new Courts of Probate and Matrimonial Causes. Mr. Reid too, now Sir John Reid, since Governor of the Bank of England, made one of a

reading party which, under his tuition, settled itself at Ryde for the long vacation of 1810. Often in after years he would speak with pleasant recollection of his moonlight plunges from the pier-head. Shortly after his leaving Cambridge to pursue the study of his future profession, he sustained the greatest affliction of his life, in the death of a younger brother, to whom he was deeply attached, whose education had been in a great degree his own work; who, to use the words of the tutor of his college, in congratulating his father on his election to a scholarship, "promised fair to tread in the steps of his brother;" and of whom he himself has been heard to speak as having, he believed, less to repent of, and as possessing a greater facility of acquiring knowledge, than any one he had ever known.

All who knew Sir W. Maule, whether personally or by reputation, knew that he was a man of great intellectual powers, and of great and varied acquirements; it is not, however, so generally known that, as a mathematician, he possessed not merely facility of acquisition and deep and extensive knowledge, but original talent of the very highest order. Not only had he startled the little world of Cambridge by the brilliancy of his performances there, by distancing all competitors without the help of a private tutor, and by pushing his researches into fields of science of which few among his teachers had enjoyed a much nearer view than Moses of the promised land, but he is not without a claim to rank amongst inventors in a branch of mathematics then in its earliest infancy, and still one of the most recondite. In a paper on the Calculus of Functions, published in the Philosophical Transactions for 1815, Mr. Babbage gives some solutions (pp. 410, 411), as supplied to him by a friend, whose name, however, he does not mention, the generalization of one of which, or rather of the artifice by which it was attained, is regarded by him as having contributed to several of the most remarkable results contained in that essay. The anonymous author of that solution was Mr. Maule, the suppression of whose name took place, not with Mr. Babbage's goodwill, but at his own instance, on grounds of professional prudence. At a later period, when confirmed professional success had rendered such motives no longer operative, the incognito was, at Mr. Babbage's

special request, removed by Professor De Morgan, in a note on page 318 of his treatise on the-Calculus of Functions, published in the second volume of the *Encyclopædia Metropolitana*. Meanwhile, in an unpublished history of the discovery and progress of the Calculus of Functions, during the years 1809-10-17, the distinguished author of the above-mentioned paper had recorded and discussed Mr. Maule's solution of the problem in question, the concluding paragraph of which criticism the writer of this memoir has been allowed to extract:—"There is little doubt," says Mr. Babbage, "that, had the acute author of this solution devoted more time and attention to this casual subject of his contemplations, he would have anticipated many of the discoveries which it afterwards fell to my lot to make, and would have contributed largely to the improvement of analysis."

The name of Mr. Babbage having been once brought in, gives us occasion to make mention of a game at chess played by him with Mr. Maule, on the top of a coach on which they had accidentally met, and carried on for a considerable number of moves, and into a position of not a little complexity, without the slightest difference of opinion as to the place of a single man, till broken off by the arrival of one of the parties at his journey's end. We give this anecdote rather from the pleasure we feel in any thing that places two men of genius in juxtaposition, than as matter of very great boast to either of them, though the playing without the board has been looked upon as a more than common feat when performed by Philidor and other great masters of the game, and does undoubtedly evince a most extraordinary power of self-concentration, especially in one who never was a professed chess-player. To the latest period of Sir W. Maule's life he was on terms of intimacy with Mr. Babbage, and would discuss points of mathematical science with as much power and interest as ever. There is another anecdote of Mr. Babbage's appreciation of Sir W. Maule which we remember to have heard on what we consider good authority, and which is of so pleasing a character that we are unwilling not to perpetuate it. Some time after the latter had been called to the bar, Mr. Babbage was lamenting to a common friend that he had not made science his pursuit, in which he was certain so

greatly to have distinguished himself. "He is doing very well at the bar," said the friend, of course more than half in jest; "who knows, he may come to be Lord Chancellor?" "And if he is Lord Chancellor, what is that to what he might have been?" was the reply; "he would have been the first mathematician in Europe"—an estimate of the dignity of science more, we fear, in accordance with the very truth of things, than likely to be often practically acted on, even by those whose best interest it might be to enforce it. In the present instance the opportunity was not wanting, for in the early part of Mr. Maule's career, the professorship of mathematics at the East India Company's College at Haileybury was offered to him; but he had at that time made choice of his profession, and declined it. In our country there is no great encouragement to making science the pursuit of one's life; and, in this very instance, the offer which gave the possibility of doing so was, in fact, due to interest much more than to appreciation of merit.

We have now arrived at his professional career. He kept his terms at Lincoln's Inn, attended the chambers of Mr. Brady, a special pleader of that day, was called to the bar in 1814, joined the Oxford circuit in the summer of that year, and held his first brief at the Usk (Monmouthshire) midsummer sessions. He also attended the Welsh courts of the Brecon circuit, which have since become an antiquarian curiosity, but which were then in the full vigour of living reality. Among his contemporaries in attendance on these Welsh courts (which, it must be remembered, exercised equitable as well as legal jurisdiction), was the present Lord Justice Knight Bruce, then Mr. Knight, of whose powers in handling a jury, and especially a certain jury of Glamorganshire squires, in a case which, in some way, involved their squirearchical prejudices, he was wont to speak with an admiration which might almost lead us to suppose that the object of it, great as his success has been at the equity bar, had yet rather missed his vocation in devoting himself to that branch of the profession.

At the bar the harvest of success is proverbially of slow growth, and Mr. Maule did not find it otherwise. Not that he had any tale to tell of his being in danger of starving while the corn

to feed him was yet in the blade ; still less of any sudden and miraculous transition from the dry strand of neglect to an overflowing tide of business. Certainly, however, his progress in his profession was not so rapid as might have been hoped for by a man of his powers, with the prestige of his university career to start him ; and this is the more remarkable, as he possessed in an eminent degree, not a few both of the higher and the lower qualities of a great *Nisi Prius* leader, and can hardly be said to have been obviously deficient in any of them. His presence and stature, without being remarkable, were sufficient ; his features bold and well formed ; his countenance striking and expressive ; his voice clear, well-toned, and powerful ; his air and manner, for the purposes of satirical and humorous expression, perfect, and by no means inadequate, when he exerted himself, to grave and serious emotion ; he possessed ample command of language, with that rare gift of felicitous expression in homely terms ; unrivalled powers of ridicule, sarcasm, and retort ; presence of mind ; fertility, and readiness of resource ; energy and resolution ; yet with all this it was only by slow steps that he found general recognition among that branch of the profession with which the selection of counsel lies ; indeed, we doubt whether at his period of greatest success he ever had, either on his circuit or elsewhere, that run of *Nisi Prius* business which has been enjoyed by many men not only of less real power, but in no equal degree possessed of obviously striking qualities. This was, no doubt, like most of the phenomena of our lives, the simple result of a complicated variety of causes, some of which it would not be difficult to those who knew him to trace out. The chief of them probably may be characterized as a virtue hitched on to a defect. His dislike of all pretence, of any thing that might be classed under the comprehensive name of humbug, was intense, still more so his abhorrence of any thing at all verging upon sycophancy in conduct ; excellent qualities in themselves, but which, when brought into action in combination with a certain waywardness of character from which he cannot be pronounced free, had in him the unfortunate result of his wilfully throwing away the fairest opportunities of putting himself forward ; of his avoiding or even repulsing acquaintances which might essentially have served him, and

which he had the most legitimate opportunities of cultivating, which in fact offered themselves to him without any cultivation whatever; of his gaining a character for eccentricity not perhaps altogether undeserved, but very much beyond what he really deserved; and finally, of a demeanour in his intercourse with actual or possible clients so little conciliatory, that, unless he has been much belied, it not seldom fell as far short of fair average civility, as that which scandalized him did of decent self-respect. In fact, with reference to this last drawback on his progress, we have heard it reported that when Mr. Knight was about to drop the Brecon Circuit, he observed, in recommending some junior friend to join it, that Maule was the only man on it fit for much, and he might always be heard blowing up his attorney.

Add to this, that, so far as success on circuit was concerned, his mode of address was not probably altogether of the kind best suited to the common run of country juries. He had neither that congenial stupidity which enables men not otherwise remarkable to appeal successfully to the stupid, nor that peculiar form of talent by which some men, any thing but stupid themselves, can condescend to and play upon the stupidity of others. His train of thought was too strictly logical to be readily followed by those who were not themselves logical, and his irony was not unfrequently perhaps taken for earnest by the matter-of-fact clowns. That this last sometimes happened when he was upon the bench, we shall hereafter have occasion to mention. Nevertheless, with all drawbacks, he was unquestionably an advocate of the first order, especially in a certain class of cases; for, beyond a doubt, he was more congenially employed in throwing cold water on the pathos of his friend and rival, Sergeant Talfourd, than in appealing himself to the sentimental emotions. We remember to have heard of a match (so to say) played out between those two masters of the game, in which court, jury, and spectators, after being moved almost, if not quite to tears (for the judge was one by no means incapable of a fit of the lachrymose, the late Mr. Justice J. A. Park), on behalf of the plaintiff, were afterwards convulsed with laughter by the speech for the defendant: to the best of our recollection Democritus carried the day. At the same time, while ridicule in all its forms, from the lightest

persiflage to the bitterest sarcasm, was no doubt the weapon which he wielded most successfully, he was quite capable on occasion of earnest expression, especially in the way of moral indignation. In that species of frothy declamation which so often passes for eloquence, he cannot be said to have failed, for he never essayed himself in it. But though Sir W. Maule never attained to that position as a *Nisi Prius* leader to which his masterly conduct of the Carlow election case (for a committee of the House of Commons is a jury, and not a very easy one to handle) would alone prove him amply entitled, yet towards the close of his career at the bar, he was rapidly advancing into it; still to the very last, probably, on circuit, he was more in favour with defendants than with plaintiffs, and for special juries rather than common ones.

In London his success was earlier; and, though far from rapid, steadily progressive. He soon became known to the few, more gradually to the profession generally, as a sound practitioner, an ingenious and subtle disputant; he early gained a firm footing in city business, and, long before he had obtained a silk gown, was universally recognized as standing in the foremost line of commercial lawyers, and especially as one of the first authorities of the day on questions of marine insurance. The hazardous promotion just alluded to he did not receive till the vacation preceding Easter Term, 1833, and then not at his own solicitation; indeed, so far from it, that when it was first offered him by Lord Brougham, he declined it, and it was only upon the Chancellor's pressing him to reconsider his answer, and subsequent consultation with his friends, that he made up his mind to accept what to so many is a fatal gift. However, it was not so to him; for as first-fruits of it he obtained the important appointment of counsel to the Bank of England, on the vacancy occasioned by the elevation of Sir James Scarlett to the bench, and had in no respect to complain that his promotion had damaged his position. Still it was in London, and especially in the more important class of mercantile causes, that he found his chief field of success; on circuit he was never so general a favourite as Sergeant Talfourd, though towards the last, as has been already observed, rapidly improving his footing there.

Of striking individual traits and popular interest, such a career

is necessarily somewhat bare, not being furnished with those reminiscences from the *Causes Célèbres* of the day which afford variety and relief to that of an advocate in vogue. Nor is it easy, or perhaps even possible, to select particular instances of arguments at the bar, so as adequately to satisfy the professional interest which attaches to the name of a great lawyer, the main object of the reporter being the judgment of the bench, and the argument at the bar rarely so reported as to do much more than indicate the ground taken and the questions raised. Not, however, to leave this part of the subject wholly unillustrated, we will refer to the two cases of *Roux v. Salvador* (1 Bing. N.C. 526, S.C. in error, 3 Bing. N.C. 266), and *R. v. Antrobus* (2 A. & E. 788), the former a leading one on the law of marine insurance, the latter one of curious legal interest. Indeed *R. v. Antrobus*, though itself merely raising a point of law for decision, was not without something of popular interest from the circumstances out of which it arose, being a prosecution against the sheriff of Cheshire for refusing to execute two criminals convicted of murder, who were in consequence brought up to town by *certiorari* and *habeas corpus*, and executed in Surrey, by order of the Court of King's Bench (*R. v. Garside and Mosley*, 2 A. & E., 266), a case which will probably be within the recollection of many of our readers as having been much talked of at the time. The question for decision arose out of the then recent abolition of the palatinate jurisdiction, which had in some respects changed the positions of the county and city and their officers, and came on for determination in a trial at bar with a formidable array of counsel on both sides. Sir F. Pollock, A.G., Sir W. Follett, S.G., Sir J. Campbell (late A.G., who had instituted the prosecution), and the present Mr. Justice Wightman for the crown; Mr. Maule, Mr. Kelly, and Mr. Welsby for the defendant, whose non-liability they succeeded in establishing. On reading the arguments on his behalf, one feels at once that the result could not have been otherwise, but we have reason to believe that it entirely took the conductors of the prosecution by surprise, which, considering who they were, is alone a sufficient warranty of its originality. The case is altogether well worth looking at for the variety of curious matter which it contains; the difficulty was ultimately

solved by an act of Parliament, 5 and 6 W. IV. c. 1. The case of *Roux v. Salvador* turns mainly on the necessity of abandonment by the assured in certain cases, for on all the other points taken there seems to have been no difference of opinion, and little or no doubt among the judges; upon that particular question the unanimous judgment of the Court of Common Pleas was unanimously reversed in the Exchequer Chamber, in a most elaborate judgment delivered by Lord Abinger; the plaintiff, for whom Mr. Maule was counsel, being the party ultimately successful. Lord Abinger's judgment is undoubtedly, as it was only fit it should be, the great feature of the case, but Mr. Maule's arguments at the bar, afford exceedingly good specimens of close legal discussion; that part especially of his argument in the Exchequer Chamber (p. 271), in which he answers the reasons of principle assigned in the court below for considering an abandonment necessary, commends itself to our mind as at once happily and characteristically thought out. One case we may mention which made some noise in its day in the scientific world, and in which Mr. Maule was engaged not as counsel but as arbitrator. It was that of a reference upon a dispute between Sir James South, the astronomer, and the well-known instrument makers Messrs Troughton, as to the sufficiency of some astronomical instruments manufactured by the latter for the former: in the course of it some of the most distinguished men of science of the day, Mr. Airy for instance, gave their evidence before the arbitrator. The case of all others, probably, in which Mr. Maule distinguished himself by general power as an advocate, was that of the Carlow county election petition in 1835; we have heard that the late Mr. Common Sergeant Mirehouse (no mean authority on such a point) spoke of his handling of some refractory witnesses in the course of those proceedings as the best done thing of the kind he had ever seen.

As a result of the local celebrity which Mr. Maule had acquired by his conduct of this case, it was proposed to him at the general election of 1837, to become a candidate for the representation of the borough of Carlow, an invitation which he accepted, and which gave him a seat in Parliament, though not without a smart contest in the first instance, and a petition

against his return afterwards. On this occasion he was represented before the committee by the present Lord Chancellor, of whom it should not be left unmentioned, that, with that gentlemanly liberality which has always distinguished him, he was desirous of declining all fees, to a very considerable amount, in favour of his professional brother; a courtesy which we have reason to know was not the less appreciated for its not being accepted. The petition failed, the committee having refused to open the registry, and the petitioners thereupon withdrawing from the prosecution of it. Of his parliamentary career, short as it was, there is not much to be said; he had barely time to begin feeling his way, and when he spoke it was at no great length, and on subjects either strictly professional or of a professional bearing. His own general remark on parliamentary, compared with forensic speaking was, that the former was by so much the harder that, at the bar, you were yourself obliged to speak, and your audience bound to listen, which was not the case in Parliament. Had his career in that assembly been longer, we can hardly doubt it would have been a successful one, if only for his powers of sarcasm and retort, with an audience so favourably disposed to that species of talent. In discussions on law reform, his originality and ingenuity, his masterly common sense and extensive knowledge, might well have secured him a prominent place.

Truth, however, compels us to add, that as a law reformer he was not likely to have been active. That he was a decided liberal in politics, a whig and something more, we have hardly thought it necessary to mention; but he had withal a strong feeling of respect for traditionary associations, a strong sense that whatever exists must have its reason of being, and therefore, *primâ facie*, its right to be; his farsighted ingenuity suggested the possible inconveniences which might result from any given change; his vigorous practical common-sense deprived him of all sympathy with that ignorant impatience of evils that lie in the very nature of things, which often forms so large an element in the cry for change—for wherever there is a dispute there is a grievance, whatever facilities you give for the prevention of fraud, may be abused for purposes of oppression by pretended creditors, whatever securities you give against op-

pression, may be abused for purposes of delay by fraudulent debtors; finally, we fear he cannot be pronounced free from that species of indolence, not unfrequently united with great power, which so abhors being put out of its way that it is apt to overrate the inconvenience of change in itself, as distinguished from the inconvenience it may possibly work. Thus, he was strongly opposed to the project of removing the courts of law from Westminster Hall, in common probably with the great majority of the existing generation of judges. He was wont sarcastically to remark on the inconsistency of the latest reforms, in first restricting the effect of the general issue, and insisting on special pleas by the new rules of 1834, and then dispensing with all special pleading whatever in the procedure of the still newer county courts. He was decidedly adverse to codification; chiefly, we believe, for a reason which is certainly of no little weight as against the ordinary schemes on that subject, though not, we think incapable of being obviated in a well-considered system. He objected, in fact, to making all decisions depend—not upon a deduction of principles, but upon an interpretation of the precise words of positive enactments; an objection with which no one, we think, that compares the general run of cases which turn on the construction of acts of parliament with those decided upon general principles of law, can fail in some degree to sympathize, however decidedly he may be of opinion that the advantage, on the whole, is on the side of codification. There is a passage in one of his judgments (*Page v. Wilkinson*, 6 M. & G., 1015), which may be cited as embodying judicially this view of his, in an application of its principle which, thus plainly stated, looks almost a truism, though there are few maxims that in practice are more frequently forgotten. In repelling an attempt to fasten on the court all the consequences of certain dicta, he observes, “We ought to consider what the court *decided* in these cases, and the language used must be looked at, not as though the court was *laying down definitions*, but merely as an *explanation of the grounds of the judgment*.” His objection to any change in the functions of the Lord Chancellor which would involve his ceasing to be a judge, that it would lead ultimately to the appointment of aristocratic Chancellors, instead of pro-

fessional ones, and so deprive the non-aristocratic classes of their hold upon that great office, and an important place in the cabinet, can hardly be thought an unreasonable one.

But, however disinclined to change as such, he had a most energetic antipathy to all abuses which he recognized as practically and not irremediably oppressive: witness his well-known onslaught on the law of divorce as it stood before the late change, of which it is hardly too much to say that it had no inconsiderable share in working the change; at least it effected such an impression that, after the lapse of several years, and in the course of the final discussion of the subject, it was made the theme of an able and vigorous article in the *Times*, and was cited by that veteran reformer Lord Campbell in the House of Lords. That he was not indisposed to entertaining and discussing projects of practical improvement, may also be inferred from his having voted in a very small minority for the first reading of a bill for the abolition of grand juries, not indeed as necessarily intending to support it in its ulterior stages, but as regarding the project as at least not unworthy of consideration. To such effect he spoke, and on this occasion had to boast of calling up Sir Robert Peel against him. He certainly was not opposed to reforming the law on the subject of arrest for debt, which, as it stood, was, he alleged, merely a device *for enabling a man to pledge the compassion of his friends*.

However, Mr. Maule's career in parliament was to be but a short one: shortly before the spring circuit of 1839, he was appointed to the bench of the court of Exchequer, upon the resignation of Mr. Baron Bolland, on which occasion he was entertained at a dinner of congratulation and farewell, by a large party of members of the bar. Early in Michaelmas term of the same year, he was transferred to the Common Pleas, upon the death of Mr. Justice Vaughan; in that court he remained till his retirement in the summer of 1855, and it is with that court that his name will remain connected in the memory of the profession—by the public at large, he is naturally most commonly thought of as a judge of assize and of the Central Criminal Court.

Of Mr. Justice Maule's character as a judge in banc, it is altogether superfluous to speak generally, and exceedingly difficult

to do so critically. To illustrate it by instances within the space at our disposal is altogether impossible, for the merit of his judgments does not lie in single points, but is spread over the whole surface of them, and lies very much in the dexterous handling of the circumstances of each particular case, so that, in order to offer an instance, it would be necessary to extract the report bodily. In general, his most striking characteristic as a judge seems to us to be summed up in a certain rare union of common-sense and ingenuity, of common-sense informed by ingenuity with ingenuity subordinated to common-sense, resulting in judgments admirable taken in the whole, but more so for their general effect than for any striking points. Not but what there is much that strikes as you read, apt and ingenious illustration, farsighted prevision of remote consequences, refined perception of analogy, felicitous expression, the whole not unfrequently seasoned with a dash of humour and sarcasm, which lends a life hardly their own to the dry bones of the argument; but still, when you have done reading, all this matter of detail sinks into comparative insignificance, and the general impression that remains is chiefly that of a lucid exposition of principles, and, above all, of a thoroughly businesslike application of them. One observation will hardly fail to strike at first sight: that with all his ingenuity there is a total absence of supersubtle hair-splitting; that practical common-sense is always the master, and ingenuity the servant, in which capacity the latter often does an admirable stroke of work, in defeating technicality at its own weapons. For instance, in the case of *Lomax v. Landells*, 6 C.B., in which a plea was demurred to, as designating one of the Christian names of a person mentioned in it by an initial I only; Mr. Justice Maule suggests (p. 581) that a vowel, being utterable alone, may alone constitute a name. To this it is objected that the plea itself speaks of it as an initial; but the judge's resources are not yet exhausted: An initial is a first letter; may not a first letter be an only one also (p. 583), as B's only son would certainly be entitled to a legacy to his eldest son?

It may be observed that his judgments rarely strike one as those of a learned lawyer, not, that is, from any apparent defect of learning, but from the absence of all display of it; whenever

learning is wanted, there is enough of it and to spare, but in general there is no black-letter, and little citation of cases. And in truth, admitting it, as we do, to be a venture of no little temerity, the attempting to gauge Mr. Justice Maule's knowledge on any subject whatever—acknowledging, as we have already done, that his learning was always equal to the occasion—we yet are inclined to doubt whether he did, in the more limited and special sense, strictly fall within the category of learned lawyers. We believe, that is to say, that both his stock of black-letter learning, and his provision of cases, were, for the most part, rather such as he had from time to time got together under the inspiration of the occasion, than the result of any systematic, still less exhaustive process. The truth is, he was by nature much rather a great reader than a hard student, and never probably studied systematically any subject whatever, except under a strong impression of duty, or pushed his systematic study of it much further than would serve the occasion in hand. With an insight that nothing evaded—a memory that nothing escaped, an energetic sense of the duty of fitting himself for success, and a great power of application when under the influence of a sufficient stimulus, he no doubt commenced the practice of his profession with an ample stock of professional information, which, in the course of a long professional experience, continuously grew—we say grew, to express an increase, not mechanical and extensive merely, but intensive and organic, in which the new matter casually acquired, or got up for the nonce, neither passed away with the occasion that brought it, nor remained merely in the memory as an isolated addition of knowledge, but was at once connected by its analogies with that which was already in hand, and put to use at compound interest, by working it out into its remotest consequences; the result was, a great lawyer, but hardly what is distinctively termed a learned one; a great lawyer in fact, rather by a mastery of the principles of the law, than by any approach to an exhaustive collection of doctrines and authorities. At the same time we believe that the extent and variety of his knowledge were such, that it would have been a somewhat hazardous experiment to speculate on his ignorance on any subject whatever, the year-books and old

abridgments included. Certainly, however, his command of cases was hardly what, with his prodigious memory, might have been expected. He himself used to say he could never recollect the names of them, by which we presume that he intended to express a failure of connecting the substance of the case with the name that serves to index it. On one subject, that of marine insurance, his substantial knowledge of the cases probably covered the entire field. On points of commercial jurisprudence generally, his judgments occasionally display a somewhat extensive acquaintance with French and Italian writers.

But the common-sense of which we speak must by no means be confounded with any inclination towards substituting popular equity for a strict administration of the law. Mr. Justice Maule thoroughly possessed that, so to say, transcendental impartiality, which is not only indifferent between the parties, but indifferent to the consequences of its decisions; which is proof, in fact, against the seductions of substantial justice and hard cases, and which resolutely holds to the very law, at whatever occasional cost to individuals. No one was ever more fully imbued with the spirit of our ancient maxim, that a mischief is better than an inconvenience—that it is better that one should now and then suffer, than that the law should be uncertain to all. He more than once took occasion expressly to enforce this great principle of jurisprudence, as, for instance, in *Freeman v. Tranah*, 12 C. B., 413, in which case an exposition of it forms the staple of his judgment; and in *Martindale v. Falkner*, 2 C. B., 718; in which latter case, an action for an attorney's bill, the question being upon the sufficiency of the signed bill presented, he remarks—“*The point certainly is not one that tends very much to the justice of the case, but I think it much more important that a statute should receive its proper construction, than that justice should be doled out to suit the circumstances of each particular case.*” Compare also *Cooper v. Willomatt*, 1 C. B., 683. That he should in words profess the doctrine, however, is not so much remarkable, as that, with his strong and somewhat impulsive sense of right and wrong, he should so uniformly act upon it; so uniformly that the maxim *fiat jus ruat justitia*, has been handed about as his—whether made by him or for him is immaterial, as, in either

case, to have obtained currency as his, it must have been recognized as illustrative of his practice. All the above cited judgments afford, in different ways, good specimens of his manner. The case of *Martindale v. Falkner* is especially worth noting, because the question in hand was upon a ruling of his own at *Nisi Prius*, which the rest of the court sustained, at the expense, we must say it seems to us, of some little straining of the law, though in accordance with substantial justice; while he himself, on the other hand, having reconsidered the matter, gave it as his judgment, that he had been in error, an instance of candour which Lord Chief-Justice Tindal is rumoured to have taken very much to heart. On one occasion he embodied his views of the necessity of a strict adherence to law, in a somewhat startling rap at his chief (L. C. J. Wilde), who had given his voice for refusing a new trial on the plaintiff's application, in a case of breach of promise of marriage; his reasons consisting chiefly of a tirade against the state of the law which allowed of such an action at all. Mr. Justice Maule immediately following upon him, opened his judgment with the observation that the question of what the law ought to be had now, he thought, been amply discussed; he should therefore, for his part, proceed to consider what it really was, ultimately concluding for granting the new trial, which had been asked for on the ground of some miscarriage on the part of the Lord Chief-Justice, who had himself presided at the former one. The sally has been softened, we believe, in the reports we cite it from our newspaper recollections, with sufficient oral confirmation. To prevent misconstruction, however, we must add that Mr. Justice Maule was always on the best of terms both with Lord Truro and all his other chiefs and colleagues; any such chance hit, given in perfect good-humour, was always taken in the same. How great his judicial weight was with them all—how great the deference which the ablest among them showed him—one of the surest tests of general power in a judge—is well known to those who have frequented the court in which he sat, and to the universal tradition of the bar.

We have said that it would be impossible to extract characteristic points—it is not very easy to select cases for reference;

we will, however, make the attempt to do something in this way, premising that the principle of selection will be not very uniform, some being chosen for the general merit of the judgment, some for the characteristic traits contained in them, some few even for the importance of the causes themselves, as lending interest to the judgments delivered upon them. In the House of Lords, then, there are *Shore v. Wilson* (Lady Hewley's trust), 9 Cl. and Fin., 499, in which, upon the main point, Mr. Justice Maule stood alone, but which, whatever may be thought of the conclusion at which it arrives, is full of passages admirably reasoned and expressed—we will instance particularly the reasons given for rejecting the evidence of *persons conversant with the history and language of the time when the deeds were executed*. *McNaghten's case*, 10 Cl. and Fin., 204, in which, it may be remembered, there was no case properly before the house with reference to which the questions could be put to the judges, so that they were propounded with much generality, as points of theory merely, upon which the house desired illumination, and in which Mr. Justice Maule, after reading the house a lecture on the unreasonableness of putting such questions, clinches his argument by citing to them the very case, with reference to which the questions were in fact, though not in form, put, as a recent authority. Here also on one point he stood alone; but upon a subject on which in our own opinion the knots must generally be cut, and not untied, and on which, therefore, if such our opinion is well-founded, it is rarely possible to arrive at any altogether satisfactory conclusion. *Burdett v. Spilsbury*, ib. 360, a case on the execution of a power, in which, as might be expected, Mr. Justice Maule was on the side of common-sense against technicality, and in which his view prevailed. *O'Connell's case*, 11 Cl. and Fin., 266; *Stephenson v. Higginson*, 3 H. of L. Ca., 670; *Gibson v. Small*, 4 H. of L. Ca., 388, a leading case on the law of marine insurance; *Jeffereys v. Boosey*, ib. 892, a leading case on the law of copyright, in which he was in a minority; *Unwin v. Heath*, 5 H. of L. Ca., 532, a very important patent case, in which a minority of the judges, including Mr. Justice Maule, carried the law lords unanimously with them. On this last case we may observe that, in addition to the misprint noticed by

Lord Brougham in Mr. Justice Maule's printed opinion, there is in a subsequent part of it another slip of, press or pen equally obvious, by which oxygen gas is substituted for carbonic acid.

In the Exchequer Chamber, there are his judgments in *Gosling v. Veley* (Braintree church-rate case), 12 Q. B., 373; the judgment of the majority in the Exchequer Chamber, in which Mr. Justice Maule concurred, was afterwards reversed in the House of Lords, where he contented himself with referring to his judgment previously delivered; in the *Mayor of Berwick v. Oswald*, 3 E. and B., 664, an exceedingly good and characteristic specimen, though again on the losing side; in *Jones v. Chapman*, 2 Exch. 820, this time in the majority. In the Common Pleas we will mention *Doe dem Howell v. Thomas*, 1 M. and G., 353; *Thomas v. Harries*, ib. 705, in which he differs from the rest of the court, in our poor judgment for the better, and in which by the way a passage occurs (p. 706, nearly at the bottom), which may serve to illustrate his general views upon codification; *Procter v. Sargent*, 2 M. and G., 36, and *Rennie v. Irvine*, 7 M. and G., 977, both on the same subject of contracts in restraint of trade; *Filmer v. Burnby*, 2 M. and G., 548; *Walton v. Potter*, 3 M. and G., 440, the concluding paragraph is characteristic—with it may be compared the judgment in *Smith v. Dobson*, ib. 62; *Borradaile v. Hunter*, 5 M. and G., 653, on the interpretation of the clause in life policies barring liability in case of suicide: the question which arose on this occasion had long before been foreseen by Mr. Justice Maule, and, in his capacity of a director of the University Life Assurance Company, he had caused their policies to be settled accordingly; *Richardson v. Kensit*, 6 M. and G., 719; *Dewhurst app. Feilden*, resp., 7 M. and G., 187, which contains a very neat and apt illustration; *Doe dem Morgan v. Powell*, ib. 992; *Petric v. Cullen*, ib. 1025; *Walton v. Chandler*, 1 C. B., 309; *Brown v. Mallett*, 5 C. B., 613; an elaborate exposition of principle, referred to by Alderson B. in *White v. Crisp*, 10 Exch. 320, and by Parke B. in *Metcalf v. Hetherington*, 11 Exch. 269–70; *Blandy v. de Burgh*, 6 C. B., 638, which contains some smart hitting at the ways of provisional committees; *Smith v. Anderson*, 7 C. B., 33, upon which we are enabled to furnish a

manuscript correction by Mr. Justice Maule's own hand, from the margin of his copy; the close of the sentence in p. 35, which now stands, "that case in effect decides, that if the principal is not named it is the same *as if none exists*," should rather stand *as if it were not mentioned that one exists*; Doe *dem* Strickland v. Strickland, 8 C. B., 743; Charles v. Altin, 15 C. B., 64. We may also refer to a case in the court of Exchequer, Bicknell v. Hood, 5 M. and W., 109, as affording a good instance of a neat and compendious solution, at one cast and purely from the terms of the case itself; also to that of Speck v. Phillips, *ib.* 283, for a short but neat and effective judgment; the same may be observed of Talbot v. La Roche, 15 C. B., 321. In Dearsley's C. C. R. (Vol. 1., p. 284, Burton's case), there is an illustration of the doctrine as to the *corpus delicti* in cases of theft, which we believe the present learned reader on common law at the Temple is in the habit of citing in his lectures: Mr. Justice Maule there says, *If a man go into the London docks sober without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed.* In the same collection of Reports we may also refer to Garrett's case, vol. 1., p. 242; to a short interposition in White's case, *ib.* p. 206; and to a similar one in R. v. inhabitants of Hornsea, *ib.* 303.

After all, it is not a satisfactory task, that of selecting specimens of Mr. Justice Maule's judicial manner, and we can hardly hope to have performed it satisfactorily; certainly we have not done so to our own satisfaction. The chief reason of our difficulty (apart from that of having to deal with a wide-spread material in a very limited time) we have already indicated. In truth, of his longer judgments the majority might serve as good specimens, if only for their general air of power and facility; the shorter ones are often strikingly pithy and to the purpose; while throughout all of them is scattered a profusion of caustic observations, neat turns, and happy hits, more remarkable for their number and general appositeness, than each for itself taken alone, and which by their very number render selection difficult. With some of those cases to which we have referred, many of

our readers will, no doubt, be familiar; some, on the other hand, have been selected for something in them or about them which has struck ourselves which may not strike others in like manner; for these the different ways in which different minds see things must account. It must be remembered, that the effect of the pungent and humorous element in his judgments as actually delivered, was heightened by a singularly effective delivery, and that the same was the case with those interpositional sallies with which he would now and then relieve the monotony of a long argument. It will be observed at first sight that, in several of the judgments cited, Mr. Justice Maule was in the minority, a circumstance, however, which in no wise affects their artistic merit; and we think that upon a closer examination it will further be observed, that in a large proportion of instances in which a difference of opinion existed, he was to be found on the side of common-sense against technicality, or on that of strict law against popular equity.

But the lawyer is only half the judge; on the common-law bench hardly the more important half. Nevertheless, we feel that we must at once renounce any attempt at an adequate and discriminating characterization of Mr. Justice Maule as he showed himself in trying causes and criminals. Those that have seen him on such occasions know all that can, or rather cannot, be said on the subject; to those that have not, no mere words will put the reality before them. It would be easy enough and true enough to speak of his readiness and accuracy in decision; of his lucidity in summing up; but that would, in fact, only be saying over again that he was a great lawyer, a quick and clear thinker, with much facility of speech, and great aptitude of expression. Equally easy and equally true it would be to praise him for his patience and courtesy with counsel, witnesses, and jurymen, to which praise it would only be justice to add, that to exhibit those qualities so uniformly as he did, in the state of suffering from ill health in which he too often was, demanded the possession of them in no ordinary degree. All this said, and when it is added, that his impartiality was beyond praise, we have before us the idea of a thoroughly good judge, but none at all of the process itself by which expedition was attained

without hurry, and those who were dissatisfied with the result, were at least satisfied that they had had a fair hearing.

And if the solid framework of his character as a judge is not easy to speak about, there is an accidental side of it which is still less so, and yet to pass it by in silence, would leave the portraiture essentially incomplete. In truth it does look very like shirking one's task, after professing the impossibility of adequately illustrating the genius of a great lawyer, immediately thereupon to pray excuse for inability to show forth the same man in his capacity of a great master of forensic humour. And yet that is what we shall have to do, and just because it was rather humour than wit that specially characterized him. This is hardly the place for a disquisition upon that inscrutable distinction, which every one feels and no one has yet expressed ; so much, however, we take to be plain matter of fact, that any one can hold custody and give deliverance of a witticism who has himself but just wit enough to apprehend it, whilst, adequately to convey the effect of humour, requires no scanty measure of the humourist's own spirit. Moreover, could we borrow the pen of a master, space would fail us ; for, if brevity is the soul of wit, a certain extension, a certain filling-out of scene and circumstance, is no less the body of humour ; and then, how to reproduce upon paper that inimitable manner, which could render the phrase of good-humoured sarcasm no contradiction in terms, which so justly hit that mysterious focus in which manifest intention and assumed unconsciousness play through one another like the changing colours of a shot silk ? How effective his irony is sufficiently witnessed in the sensation produced by that sentence for bigamy at Warwick, already referred to in connection with the law of divorce :—

Prisoner, you have been convicted upon clear evidence ; you have intermarried with another woman, your lawful wife being still alive. You have committed the crime of bigamy. You tell me, and indeed the evidence has shown, that your first wife left her home and her young children to live in adultery with another man. You say this prosecution is an instrument of extortion on the part of the adulterer. Be it so. I am bound to tell you that these are circumstances which the law does not in your case take notice of. You had no right to take the law into your own hands. Every Englishman is bound to know that when a wrong is done, the law, or perhaps I should rather say the constitution, affords a remedy.

Now, listen to me, and I will tell you what you ought to have done. Immediately you heard of your wife's adultery you should have gone to an attorney and directed him to bring an action against the seducer of your wife. You should have prepared your evidence, instructed counsel, and proved the case in court; and recollect that it was imperative that you should recover, I do not mean actually obtain, substantial damages. Having proceeded thus far, you should have employed a proctor and instituted a suit in the Ecclesiastical Courts for a divorce *a mensâ et thoro*. Your case is a very clear one, and I doubt not you would have obtained your divorce. After this step your course was quite plain; you had only to obtain a private act of Parliament to dissolve your marriage. This you would get as a matter of course upon payment of the proper fees and proof of the facts; you might then have lawfully married again. I perceive, prisoner, that you appear scarcely to understand what I am saying to you, but let me assure you these steps are constantly taken by persons who are desirous to dissolve an unhappy marriage; it is true, for the wise man has said it, that, "a hated woman, when she is married, is a thing that the earth cannot bear," and that a "bad wife is to her husband as rottenness to his bones." You, however, must bear this great evil, or must adopt the remedy prescribed by the constitution of your country. I see you would tell me that these proceedings would cost you £1000, and that all your small stock-in-trade is not worth £100. Perhaps it may so be. The law has nothing to say to that; if you had taken these proceedings you would have been free from your present wife, and the woman whom you have secondly married would have been a respectable matron. As you have not done so, you stand there a convicted culprit, and it is my duty to pass sentence upon you.—You will be imprisoned for one day.¹

Occasionally, indeed, Mr. Justice Maule's taste for irony led him to forget that it is a two-edged weapon, especially when applied to the apprehensions of a country jury. Thus, we have heard of a case of wounding with intent to do grievous bodily harm (he was wont, we believe, to tell the story himself); the facts are undisputed, the defence is reduced to a desperate, not to say impudent, attempt at bringing them within the compass of a common assault; the judge thereupon instructs the jury that the view of the law taken by the learned counsel is perfectly correct; if, therefore, they are of opinion that the ripping up the prosecutor's belly, so as to let out his bowels, had been done without the intent of doing him any grievous bodily harm, they will acquit the prisoner of the more aggravated offence, and find him guilty of a common assault merely; if they are not of that opinion they will find him guilty on the principal charge.

¹ We cite from the *Times* of January 27, 1857.

The jury (a Wiltshire one), seeing nothing in the direction but an approbation of the line of defence, return a verdict in accordance with the former branch of the alternative! There is another similar story of which Surrey has the honour. The offence charged is coining, the evidence full, clear, and indisputable; the only resource which counsel's ingenuity can suggest for the defence, is to contend that the imitation is so clumsily executed that it cannot be said to be an imitation at all; again the judge directs the jury that the statement of the law as laid down for the defence is perfectly correct; if, therefore, they are of opinion that the prisoner, in manufacturing the article shown them, did not intend to imitate a half-crown but some other thing, a boot-jack, for instance, an inkstand, a looking-glass, or pair of nut-crackers, in such case they will acquit; and again the jury adopt the ironical approbation, and acquit accordingly!

At all hazards we will add one or two stray hits, rather, however, as illustrations of the impossibility of conveying the effect of his humour upon paper, than of the humour itself. "One of these defendants, Mr. —, is, it seems, a minister of religion, of what religion does not appear; but, to judge by his conduct, it cannot be of any form of Christianity," is the character with which he introduces a specimen of spiteful piety, in his summing up on the case of libel, arising out of the proceedings at Birmingham against the so-called Baroness Von Beck.

"May God strike me dead! my Lord, if I did it," exclaims a convicted prisoner on the announcement of the verdict; for a marked space the judge sits in the attitude of expectation, jury and spectators wondering what next; at last he breaks the silence:—"As Providence has not seen fit to interpose, the sentence of the court is," &c.

"You have already read that section four times, Mr. —; it's iteration; it's I use no epithet, it is iteration!" with a look that implies an anathema.

A city policeman states that he is in the "*hens*" (N division); "Do you mean the *Poultry*?" inquires the judge.

"Did you not on going down find a *party* in your kitchen?" asks an underbred barrister of a witness. "A tea-party, Mr. —?" blandly interposes his lordship.

"Out with it, the ladies don't mind it, and you needn't be afraid of me;" was his exhortation to a hesitating witness, in a case from which it might have been expected that the softer sex would long since have retired, but which they were manfully sitting out, while the evidence grew hotter and hotter, and had at last reached its climax.

Of these, it is only the first and fourth of which we personally guarantee the authenticity; the second, we think, bears strong internal evidence of being genuine, while the rest seem quite likely to be so. His reason for drinking beer—assigned while at the bar to one of his professional brethren, who had proposed a glass of sherry as an accompaniment to the lunch they were taking, while waiting for the turn of a cause in which they were both engaged—that he found it the only way to bring down his mind to the level of the judges, has been so often quoted, that we only refer to it here because, in its circumstances at least, it has been variously misquoted, in one version as having been addressed by him while at the bar to the judges themselves, in another as having been applied by him at a later period to his colleagues on the bench.

As a criminal judge, he was remarkable for leniency; it has sometimes been thought for too much of it. His handling, moreover, of the judge's office of counsel for the prisoner, has been criticized, as inconsistent with that strict impartiality which we have attributed to him. We believe, however, that it would be found on examination, that his leniency was by no means such as to prevent a due exercise of severity in cases of real enormity, but rather a compassionate consideration of human infirmity under temptation in cases of minor delinquency; and that his disposition to get a prisoner off was much of the same kind, and was at all times carried out by a merciful view of the facts rather than by any straining of the law. Certainly in the case of Frost, Williams, and Jones (*Moody, C. C. R.*, 170), there was enough of doubt on the law, witnessed by the difference of opinion among the judges, to have countenanced one who was at all disposed for tampering with it, yet on each and every of the points Mr. Justice Maule's judgment was adverse to the prisoners. We remember a case which may serve to illustrate

at once his willingness to let slip a petty offender (whose imprisonment before trial had probably been quite punishment enough), and to give a lesson to a pert pretender. The case was a larceny of the most trivial kind; the counsel for the prosecution, a young gentleman of exceedingly self-sufficient demeanour, probably one of a class in which Mr. Justice Maule did not greatly delight, who, on the strength of connection, pick up some of the business which would be better bestowed on better men. The learned gentleman swaggers through his statement, examines his witnesses, and sits down, full of conscious dignity. "Have you no more witnesses to call, sir?" "No, my lord." "Your case is closed, then?" "Certainly, my lord," somewhat indignantly. "Then, gentlemen of the jury, you have only to acquit the prisoner, as no evidence has been given of the property in the article alleged to have been stolen, and, for ought that appears, it may have been the prisoner's own." The judge, though giving quite hint enough to serve as a word to the wise, that there was some imperfection in the evidence, had not chosen to point out more explicitly what the imperfection was; so the prisoner escaped, and "brother Bump-tious" stood convicted.

In several of the most important cases in which his direction to the jury has been the subject of criticism, we feel no doubt whatever of his being in the right. We have occasion to know that in the mysterious case of Bolam, at Newcastle, in which, under circumstances of great difficulty in coming to any conclusion at all, he led the jury to a verdict of manslaughter, his solution had the full approbation of Mr. Baron Gurney, a great authority on such a matter, and that he himself, many years afterwards, adhered to it on reflection, as being in very fact the most probable one. In the case at Derby of the poachers, in an affray with whom Mr. Bagshawe met his death, and who were acquitted, on the ground that, under the circumstances, their resistance to arrest had not exceeded legal bounds—a case which was much commented upon at the time; we must at least profess our own conviction that the judge's direction to the jury was entirely what it ought to have been. In the case of Sir John Milbanke, one of cutting and wounding, at Winchester, in the spring of 1839—

the first of any importance which he tried, and which was made the theme of an attack on him by the *Examiner*—it is difficult to see how any other result could have been obtained had the judge been ever so disposed for a conviction, the prosecutor being, as the *Examiner* itself observed, in fact, the principal witness for the defence, and every body concerned being evidently determined (whatever the truth might be) on treating the affair as a mere accident. We notice this case chiefly as being the peg on which was hung the first of a series of attacks on Mr. Justice Maule in the newspaper mentioned, the persistency of which caused the subject of them to remark, that he must, unknown to himself, have conferred some great favour on the editor. He considered that so persevering a spite could only have its origin in ingratitude; for ourselves, we are disposed to adopt a less metaphysical solution, and to believe that the *Examiner* was merely acting in its ordinary vocation (to borrow the immortal words of Mr. Gregsbury), of playing the devil with every thing and every body, and more frequently found or made occasion against Mr. Justice Maule than against others, the points of whose character and demeanour were less strongly developed. We may remark incidentally, that it was by no means inconsistent with Mr. Justice Maule's view of impartiality, even at *Nisi Prius*, to lead the jury pretty decidedly when the justice of the case required it; had he not done so, for instance, in the case of libel we have already referred to, as arising out of the Baroness Von Beck's case, the defendants would hardly have been so soundly trounced as they most deservedly were. We need scarcely remark, that the moral courage to take a side on fitting occasions, is fully as necessary to complete the character of a judge, as impartiality is to give the groundwork of it.

It affords a curious instance of the difficulty of satisfying, not merely every body but any body, that a judge who has been so often found fault with for over-leniency, should on one occasion have been the subject of a violent attack on the score of hard-heartedness. The ground of it was a case at the Old Bailey, in which a woman was tried for murder, for having thrown herself and child into a canal, by which the latter had been drowned. What it was that was complained of we know not; the facts were patent, the jury could not but convict, the judge could not

but pass sentence; the sentence was, however, afterwards commuted, upon the usual reference by the Secretary of State to the judge who had passed it, and we believe it was the opinion of those who had taken the trouble really to look into the circumstances, that the case, though not perhaps one for carrying out the extreme penalty, yet was by no means worthy of such an ebullition of sentiment as it excited. However, on this state of facts, the judge was assailed by *Punch*, in an article said to be from the pen of the late Mr. Jerrold, which he concludes (we quote from memory) with this expression:—"Thank God, the world is not made of Justice Maules, nor are there many natures like his!" On Mr. Jerrold's vocation and discretion as a critic in matters of criminal jurisprudence, it may be sufficient to observe, that in his tale of St. James and St. Giles, the scene of which is laid in the *last century*, he makes a great point of showing up the iniquities of the bar in their *speeches* on behalf of murderers, and other enormous criminals.

Throughout the greater part by far of his judicial career, Mr. Justice Maule had suffered severely from confirmed ill health, in the latter years of it to such a degree that hardly a circuit passed without an attack that gave reason to fear it might be the last. Under these circumstances, feeling himself totally unfitted for longer continuance in a situation demanding occasional great exertion, though still in the full vigour of his intellect (which, indeed, he maintained to the last hour of his life), he retired from the Bench early in the summer of 1855. He was immediately added to the Privy Council, in the judicial committee of which his talents still found fitting employment. The forms of that tribunal are not such as to exhibit the part taken by each individual judge in its deliberations; but at least one most masterly judgment, that in *Castrique v. Buttigieg*, 10 Moore, 105, on appeal from Malta, illustrates this portion of his judicial career. It decides that an agent, indorsing as such merely a bill of exchange to his principal, does not thereby become liable to him as an indorser; a point certainly not without difficulty, since we happen to know that Sir W. Maule's first impression was adverse to the conclusion at which he, with the rest of the committee, ultimately arrived. How severe had been the pressure of ill health that forced him

to retirement may be in some degree estimated from the fact, that, since his appointment to the Privy Council, he had again and again been prevented by it from paying her Majesty the usual mark of respect by attendance at a levee—an omission certainly not intentional; for, with all his aversion to any thing like sycophancy or solicitation of favour, no one was ever better disposed to render their legitimate homage to high place and established institutions. He continued to think anxiously upon the subject; and, but a few days before his death, he had expressed his intention of making an attempt at fulfilling what he regarded as a duty on the very first occasion that should present itself.

After sustaining more than one attack in which his life had been all but despaired of, Sir W. Maule at last sank, after an illness of a few days, from which neither he himself nor those about him had entertained any apprehensions, and from which he was considered to be recovering. Death came upon him so suddenly, that the approach of it gave the first warning of immediate danger, and, though sensible to the last, he probably passed away without being, more distinctly aware that he was dying, than one is that one is going to sleep. He was never married; the sole descendants of his father and mother that he has left behind, are his only sister with her family; his two brothers died young, and both unmarried, the one, as has been already mentioned, the elder (and eldest of the family), as a lieutenant on the East India Company's Madras Establishment.

Of Sir W. Maule's talents and attainments we have already spoken incidentally and piecemeal; nor were they by any means confined to the range of professional and academical pursuits; to do justice to their extent, variety, and quality, is more than we can venture to undertake. To what we have said of him as a mathematician, we have nothing to add; his classical learning was all that might be expected from one who, if he had not obtained the highest classical honours at Cambridge, had been urged to compete for them by those that knew him, and knew what the competition was. In law, an amount of knowledge great in itself, and always equal to the occasion, was somewhat thrown into the background by the vigour and originality of his intellect. Many a man has passed for learned on the strength of

less, when it has been all he had to distinguish him. Beyond these bounds it would have been difficult to measure his knowledge, and on any subject whatever, dangerous to assume his ignorance; not, of course, that he was master of them all, but he was master of so many, and possessed of so much fragmentary information on so many more, that he might be found possessed of any given piece of knowledge the least expected or probable. If, indeed, any information which he possessed could properly be called fragmentary, for his power of co-ordination was equal to his memory; and however few the positive facts which he might possess upon a given subject, they still seemed to hold their places in a system, and could all be brought to bear upon the right point, and at the right moment. His knowledge of English and French literature was great; of Italian and Spanish, we believe, not inconsiderable; at least he would say, if asked, that he knew a little of them, which would have been the reply he would probably have given had he been asked whether he knew any thing of law or mathematics. His memory was prodigious; facts, names, dates, complicated mathematical expressions, long passages of Greek, Latin, and French poets, in all sorts of metres, passages which for years he had never seen, long strings of nursery rhymes, all lay side by side together in that capacious storehouse. His knowledge of *ana* was boundless; he himself was wont to relate, somewhat triumphantly, how once upon circuit, his postchaise companion had picked up at a bookstall a collection of anecdotes containing, in his estimate, an unusual proportion of fresh material, how thereupon he had himself undertaken to give the point of any story in it, on hearing two lines of it read, and had duly fulfilled his boast without a single failure. His conversational powers were such that Lord Brougham is reported to have designated him as the only man in London he was afraid of in conversation; the story may or may not be true, but to get about, it must have possessed verisimilitude in the eyes of those that knew him. His powers of sarcasm and repartee, of humorous observation and quiet drollery, were such as would have been remarkable had they stood alone, with a manner of delivering his good things that would have made the fortune of a comic actor in the line of high art. Of his powers of literary

composition we are not aware that any specimens exist, otherwise than in his written judgments, which would induce us to rate them highly. Some short notes of his on formal occasions, letters of testimonial and the like, we have seen, which seemed to us perfect in their way. One minor accomplishment which he possessed may be worth recording as a somewhat strange one for a judge; he was singularly dexterous in picking locks, which he could not only open, but even, we believe, close again (a much more difficult matter), with no other appliance than a stout piece of wire. It had been, in the first instance, forced upon him by his habit of losing his keys; and he used to tell the story, how upon one occasion he had astonished a country locksmith who had been called in, not so much for his skill as for his implements, none being else at hand, by opening a portmanteau which the man of art had pronounced impregnable. He was also a considerable proficient in the somewhat kindred mysteries (kindred at least metaphorically) of deciphering and solving puzzles.

Yet a few words as to the character of the man, which has we believe often been misunderstood, which was not perhaps upon a superficial observation quite an easy one to understand. He has been spoken of as a cynic, perhaps has been thought so by many who had just seen him, and did not know him; and no doubt there were certain distant points of view, from which, without the correction of nearer approach, he might very well bear this aspect, but any thing less cynical than the substance of his character it is difficult to conceive. He was a man of jovial temperament, using the word in its original and best sense—one that enjoyed life himself, and liked to see others enjoy it. In familiar intercourse he was the very soul of pleasantry and humour, and of pleasantry and humour of that best kind, which, without presenting many salient points, leaves behind an agreeable permanent impression. This when he was disposed for company and conversation. It is true he was not always so disposed, and when not, was at little or no pains to make himself actively agreeable; a fault of character if you will, but one which it is extremely difficult fairly to estimate, for who can appreciate for another the exertion it may cost to be companionable against the grain? The defect, however, such as it was, was purely negative; if not dis-

posed for company, he avoided it ; if not disposed for conversation, he evaded it ; there was nothing of ill-humour or moroseness about his way of doing it ; and with an equity which is so seldom found as to make it worth marking as a point of character, he never saw any thing amiss in others using the same liberty in this respect that he assumed to himself. That he was not very tolerant of pretence or pretension is true enough, equally so that he would at times show them up without much mercy, both publicly and in private, though rarely without considerable provocation, or at least temptation ; for he was essentially a good-natured man, and thoroughly disposed to make allowance for all the forms of human infirmity. His humanity, courtesy, and command of temper on the bench, and that under circumstances which might well have palliated some shortcomings, we have already spoken of ; that same long course of ill health, which might there have served for excuse, had any been needed, will fully account for any thing that may seem unsocial in the habits of his later years. What may fairly be laid to his charge is something of waywardness ; a somewhat morbid sense of independence, beyond what man is intended for ; a disinclination to exert himself except under pressure, but for which he would have played a foremost part in his generation. But those that knew him best speak of him as nicely sensitive to right and wrong—as in all the relations of life, kind, just, and generous—as a good son—a good brother—a good friend—and a good master. Nor were the action of his kindness and generosity bounded by the circle immediately about him ; it extended to many who had little other claim upon them than that of being in need of them, and with a graciousness of manner that redoubled the kindness of the act. If the attachment of friends is any proof of moral excellence, that he possessed most amply ; and his latest friends were among his earliest ; Mr. Babbage and Sir Edward Ryan, who had commenced their acquaintance with him nearly fifty years ago at Cambridge, were almost the only persons with whom his health allowed him to keep up any intimacy to the end of his life ; the latter was among the very few (few by his own desire) that followed him to the grave.

And now, on looking back upon our sketch, we cannot but feel

dissatisfied with it ; the outline, as we have drawn it, is sadly imperfect—the colours dim—the traits fragmentary ; but time and the press will not wait for us ; what we have written must now go forth as it is written ; and we must rest contented with having at least rendered our feeble tribute to the memory of a noble nature and a great intellect.

ART. II.—THE ADMIRALTY COURT AND ITS REFORMS.

THE Admiralty Court is the sole survivor of the Courts of Doctors' Commons.

To some persons it may seem so unaccountable that there should be any survivor at all, that, we think, they must be grateful if we explain the causes of what is to them an inexplicable phenomenon. The explanation itself is ready, for the causes are but of yesterday.

Like all great and effective agents, these causes were few and simple. They are connected by necessity with the great judge who presides over the Court of Admiralty ; for, without his countenance and aid, they would have lacked embodiment and powers of action. But they are, nevertheless, distinct in themselves, and may be considered apart from the high personal qualities of Dr. Lushington ; which, unexampled as they are, would otherwise have been of themselves scarcely able to have protected his court against the condemnation of the world ; or, if they had succeeded in so doing, the tenure of the court would now be limited to his life.

Other causes have intervened which promise to make the Court of Admiralty as lasting as any of her sisters that have honoured Westminster with their sittings for so many ages. But, in investigating these causes, we shall see that the great judge alluded to, imbued as he is with the best spirit of the times, with a mind to see an anomaly, and with a heart to combat it, was

assisted *aliunde* in the idea of his reform—that he accepted that idea, and gave it a legal shape.

Some time in 1853, a pamphlet appeared privately from the pen of the present Registrar of the Admiralty (H. C. Rothery, Esq., who was then an examiner in the Courts of Doctors' Commons), entitled, "Suggestions for an improved mode of pleading, and of taking oral depositions in causes conducted by plea and responsive allegation."

The suggestions had reference to all the then existing Courts of Doctors' Commons. But of them, those which were called especially *ecclesiastical* courts, being under a fatalistic spell, did not adopt what Mr. Rothery recommended, and have died. The Court of Admiralty adopted his leading suggestions, as we shall see, and lives; and it is easy to show that this adoption is of its existence a *causa sine quâ non*.

But before stating what these leading suggestions were, we will give the reader a notion of what the old practice was which Mr. Rothery sought to remove, in order to make way for a better substitute. Upon this subject Mr. Rothery observes, (p. 8)—

1. Almost the first step in a plea and proof cause, is the delivering into court an allegation, or libel as it is sometimes called, setting forth, in some detail, the grounds upon which the plaintiff claims the interference of the court in his favour; which, for more easy reference, is divided into separate heads or articles, numbered consecutively.

When the allegation has been admitted, the next step in the cause is to call upon the adverse party for his personal answers to the several articles of the allegation which has been given in; and here generally commences the delay in the present system of proceeding. Upon the answers having been brought in and formally admitted, the examination of the witnesses takes place, either in town or by commission; publication of the evidence is then prayed, generally on the first session of the term which follows the examination, and thereupon an allegation is asserted by the adverse party, which is perhaps not brought in until the third session of that term. A similar course is then pursued, the witnesses are not examined until after the personal answers of the adverse party to this allegation have been given in; and, upon publication being again prayed, a responsive allegation is in turn asserted by the other party. And thus the matter travels on, until publication at length passes, when the depositions are copied, and delivered out to the proctors, and the case is then set down for hearing. Such a course of proceeding, it is needless to observe, necessarily entails very considerable delay.

This gives us an idea of a proceeding so tortuous and so slow, that the famous simile of "the wounded snake dragging its slow length along," arises in the mind of the philosophic reflector, and even pains that, generally speaking, cool-hearted person. The effect upon the suitor's heart and his purse must have been terrific.

To remedy this evil, Mr. Rothery suggested—

. With a view to remedy as far as possible the evils which must attend so dilatory a form of proceeding, it is in the first place suggested that the whole of the pleadings in the cause should be closed before any witnesses are examined. Let each party state his case fully by allegation, and responsive allegation, and when all the pleadings have been finally concluded, and the points at issue in the cause are clearly set out, then, and only then, let the witnesses be examined.

It will be at once apparent that the adoption of such a course would at least ensure a great saving of time; but it is thought that this would not be the only advantage attendant upon closing the pleadings before the examination of the witnesses. It can easily be imagined that there may be many statements advanced in the opening allegation, upon which, when explained in the adverse party's allegation, it would be found unnecessary to examine any witness at all. Until both sides of the case are fully set forth, it is almost impossible to know what are the material points at issue, and to those points, and those only, would any witnesses be produced.

It would seem also, that this mode of proceeding would in most, if not all cases, obviate the necessity of taking the personal answers of a party to the several articles of the adverse allegation. For the chief, it may almost be said only, reasons for taking a party's personal answers, are,

1st, To prevent witnesses being examined to prove facts which may hereafter be admitted in the adverse allegation.

2nd, To prevent a party pleading matter which he knows or suspects to be untrue.

Now it is clear that, if all the pleadings were closed before the examination of the witnesses commenced, the first of these two objects would be at once attained; and it would seem that the second might easily be effected by compelling the party giving in an allegation, to swear that, to the best of his knowledge, information, and belief, the contents of his allegation are true.

It may also be observed that, if the pleadings were closed before the examination of the witnesses commenced, great saving both of time and of expense would be effected by examining all the witnesses, resident in some distant part of the country, under one and the same commission on the several allegations in the cause, instead of its being necessary, as at present, to have two, and even three commissions, at long intervals of time, to

the same place, to examine the witnesses separately to the respective allegations in the cause.

This was the first point of reform urged by Mr. Rothery ; and in this plan there was as near an approach to an issue as the detailed equity pleadings of Doctors' Commons could ever attain.

After the consideration of the pleadings would follow, in natural order, an examination of the method of taking evidence upon them. Upon this point Mr. Rothery observed, (p. 11)—

II. Let us now proceed to inquire how the examination of the witnesses is at present conducted. And first, if the examination takes place in London, an appointment having been made, a witness is produced to the examiner, and is designed by the proctor to some or all the articles of an allegation. The examiner puts such questions to the witness as he deems best adapted to elicit all the information which the witness can give on the matters pleaded in the several articles to which he may have been designed ; and, as the witness gives his answers to those questions, it is the duty of the examiner to reduce into writing a connected narrative, embodying, as far as may be, the questions and the answers of the witness. This, however, is at best but inaccurately done, chiefly on account of the examiner's inability to remember the exact words, when the answer, as frequently happens, is very long. And when the witness is asked to repeat his answer, he will almost always vary the construction of the previous sentence, and thus destroy the connection between that part of the sentence which may have been already written down by the examiner, and the part which remains to be written. Thus the examination proceeds, and when the deposition in chief has been completed, it is read to the witness, and signed by him. His examination on interrogatories then commences, and his answers are reduced into writing by the examiner, in the same manner as on the examination in chief, and the same having been read over to him, the witness signs his deposition at the end, acknowledges his signatures before a surrogate, and is dismissed.

When the witnesses are examined in the country by commission, the mode of conducting the examination is very similar. The examiner and the two proctors proceed to the place where the witnesses are chiefly resident, and a clergyman of the neighbourhood having accepted the office of commissioner, the witnesses are produced, and are examined in chief and on interrogatories, exactly in the same manner as in London.

We thus see the startling nature of the ecclesiastical practice, that evidence was taken upon the pleadings—declarations, pleas, and replications—all piecemeal, and before issue had been joined. But what, also, was most startling of all, and the least intelligible part of this wisdom of our ancestors, was, that all this was done

in the dark—foe smote foe, without being able to discriminate each other's head from each other's extremity. The party whose witnesses were examined in chief, and the party who cross-examined them, knew nothing of what such witnesses declared or confessed. Of this circumstance Mr. Rothery presupposes a knowledge in the minds of his readers; and therefore nowhere explicitly states it. Mr. Rothery then proceeds to discuss at length the question, whether the system could be amended, and in what manner the amendment could be effected, (p. 24) —

III. The third and last point which it is proposed to consider, is how far it would be expedient to permit the proctors, and occasionally even counsel, to be present at the examination of the witnesses? And although greater difference of opinion is likely to exist on this than in respect to the other portions of the proposed plan, yet it is thought that no inconsiderable saving, both of time and expense, would probably result from its adoption. The chief ground for this opinion arises from a consideration of the general nature of the interrogatories which are administered to the witnesses under the present system.

If the interrogatories in a cause be considered, it will be found that they generally consist of three classes. The first, which contains the so-called "common form interrogatories," has reference to the connection presumed or supposed to exist between the witnesses and the party for whom they appear, to their interviews and conversations with the party, or his agent or solicitor; and to the interest, pecuniary or otherwise, which they (the witnesses) may have in the issue of the suit. This class of interrogatories are generally administered indiscriminately to all the witnesses in the cause; and, although answers important to the issue may sometimes be elicited by them, it may safely be affirmed that it is a matter of very rare occurrence, and that more frequently an upright and honourable witness is annoyed and insulted by the wholly unjustifiable insinuations which they frequently contain.

The second class of interrogatories contains a species of cross-examination upon the several articles of the libel or allegation, and it is generally the practice to administer to a witness all the interrogatories which refer to the several articles to which he may have been designed; and this, of course (the examination being private), without reference to the answers which he may have given in his examination in chief. The result is, that the witness frequently, particularly in testamentary suits, recites a second time, but in different words, the greater part of the evidence previously given by him in his examination in chief.

The third class consists of questions addressed to the respective witnesses as to their own individual acts or remarks, in relation either to the proceedings in question, or to the parties in the suit, or as to their charac-

ter or conduct in matters wholly foreign to the cause in dispute, and tending to impeach their credibility as witnesses.

Now it is thought that, if the proctors were present at the examination, the first class of interrogatories would very rarely be administered at all, and the second only to a limited extent, and in a very modified form ; and thus much useless matter and needless repetition might be avoided. There is no part of an examiner's duty which is so wearisome or so disagreeable, as the administering to witnesses interrogatories which cannot result in any good, but which the examiner is notwithstanding compelled to ask.

These are, however, not the only advantages which would result from the proctors being present at the examination of the witnesses. It is often discovered at the conclusion of a cause, that there is an unnecessary amount of cumulative evidence to outlying facts, which might have been satisfactorily proved by one or two witnesses at most.

Such are the reasons which induce the writer to think that no little advantage might result from the presence of the proctors at the examinations. It is not, however, proposed to give them the power of examining or cross-examining the witnesses in person ; it is better that the questions should be administered to the witnesses through the examiner, whose only object would be to elicit the truth ; and thus there would be no fear of introducing that system of browbeating and confusing conscientious witnesses, which is the great defect of all *vivâ voce* evidence in open court. The questions on cross-examination might be either in the form of written interrogatories settled by counsel as at present, or of rough notes drawn up during the progress of the examination, as circumstances might require. Surely, under such a system, the interrogatories to witnesses would be very materially reduced in number, would be more to the point, and much less offensive, than they now often are, to respectable witnesses.

These suggestions were pre-eminently *à propos*. They were called forth by circumstances with which no one was better acquainted than Mr. Rothery was, from the opportunities which his office of examiner afforded him. They were opportunities for forming conclusions which a thinker could not ignore, and a high-minded man would not shrink from. For the great genius and learning of Dr. Lushington had so vastly increased the business of his court, that the defect of procedure (before described by us), which it then shared with the other civil-law courts, became alarming, and threatened to bury the court under a Titanic accumulation. It was then that Mr. Rothery proposed his remedy and reform.

A good idea must, by moral necessity, make progress ; and in the new rules promulgated by Dr. Lushington, in 1855, for his

court, we find the two reforms which Mr. Rothery had adumbrated brought into legal life and operation.

At the same time, Dr. Lushington added further reforms of great importance, under the action of which the Court of Admiralty breathes the tide of business, and carries its burthen with steadiness and buoyancy.

The most remarkable of these reforms was the institution of what is called the Preliminary Act, in actions for damage arising out of the collision of vessels. The nature of this form of pleading will be best described in the words of the rule which created it:—

“In all cases of damage, unless the judge shall be pleased otherwise to direct, each party or his proctor shall, before the libel or act on petition is given in, bring into and deposit in court a sealed packet, containing a statement of the following particulars:—

“1. The names of the two vessels which came into collision, and the names of their respective masters.

“2. The time of the collision, as nearly as can be stated.

“3. The locality of the collision.

“4. The direction of the wind at the time.

“5. The state of the weather.

“6. The courses of the respective vessels on first sighting each other.

“7. The distance at which the other vessel was first seen.

“8. The courses which each vessel thereupon adopted to avoid the collision.

“9. The parts of each vessel which first came in contact.

“And such packets shall remain in the registry, sealed up, and shall not be opened, save with the permission of the judge, until the proofs in the cause are brought in, or the whole of the pleadings and examinations are concluded; and such statements shall be called the ‘Preliminary Acts,’ and may be referred to and used as evidence at the hearing of the cause.”

In a series of observations upon the proposed new rules before their publication, Dr. Lushington had briefly commented upon this rule in the following manner:—

"This rule is intended to facilitate the attainment of two objects :—

"1st, To obtain a clear *constat* of all the leading facts on which the decision of such cases (*viz.*, of damage) almost universally depends, and which at present are to be sought for through a large mass of papers, with no divisions, and often in no order of time. To learn the information in this shape will be a great convenience to the Trinity-Masters, and also to the Court.

"2nd, To prevent the defence being manufactured to meet the case."

The general object of the preliminary act, as thus concisely stated by Dr. Lushington, is therefore to narrate, *res tenues tenui sermone peractas*; and, as the facts of all cases are simple if told truly, to prevent glossing and overlaying, by compelling a forced simplicity of narration on the part of the plaintiff and the defendant.

The objects of this form of pleading, so entirely as it is *extra ordinem judicii*, may not be so obvious to lawyers in general as they are to those who practise in the Admiralty. But there were many and very sound grounds for such a creation of law.

The Court of Admiralty, as was observed in a former paper in this Magazine, has the right to try cases on a *viva voce* examination of witnesses before itself, and it has exercised this right. But though willing in *all* cases to do so, the peculiar character of maritime affairs and maritime persons, has precluded, and will preclude, the frequent occurrence of such a mode of trial. Seamen cannot be easily got all together at one time, and for one examination. Their evidence must therefore, in most cases, be taken piecemeal, and by a system that strict common law does not recognize; or which, if it recognizes, it does not favour. But evidence taken under any other mode than the simultaneous production of a plaintiff's and a defendant's witnesses at one and the same time, before the same tribunal, though better than none at all, must be subject to many and glaring defects. It must, in short, by affording opportunities and time for steady and cold-blooded theorization, unintentionally encourage the fabrication of evidence to supply deficiencies, and protect points of attack. This state of things is not only lamentable in

itself, but places the Court of Admiralty, *en permanence*, in a position of difficulty, such as its sister courts only rarely find themselves in. It has, as a rule, to determine facts, in themselves always of delicacy and complication, upon evidence taken by an imperfect but inevitable method, and therefore containing all the inventions and involutions which artful witnesses, unwinnowed by a trial at law, never fail to introduce amongst the truth of which they deliver themselves. And the difficulties of the Court are the greater, inasmuch as the facts submitted to it in such a mode, are not common or ordinary facts, but are, as we think Dr. Lushington has somewhere happily described them, scientific facts. And these scientific facts are deposed to by scientific persons, by experts, by men who can, with little trouble, make a fact accommodate itself to a theory which they have formed or have accepted. A few points, one way or the other, will close-haul their own vessel, or drive their opponents freely before a fair and favourable gale. Time can be as easily hastened as protracted where watches are not worn or appealed to. But it would be tedious to enumerate how nautical facts may be, and are, misrepresented by shipmasters, who fear the consequences of their own actions, and by crews, who reiterate the *verba magistri* with as little reflection as children, and as little conscience as slaves. In fact, merchant seamen of all grades are nearly as regardless of truth as the London cabman is thought to be, though they possess an undoubted advantage over the latter, in their prepossessing appearance and hearty manners. With such delicate facts to be proved, and such slippery witnesses to prove them, it is easy to see that a judge, to do his duty, has a hard and difficult task. And it is a task that he must grapple with, and discharge alone. No jury, as juries are usually constituted, can help him; for the matters before him are such as most juries would find themselves as helpless to deal with as children would be. The black-coated farmer of Surrey, and the green-smocked rustic of Herts, in such matters, have no chance but to follow a leader, perhaps the judge, but more often the last speaker at the bar.

Such matters, therefore, can only be determined with skilled and scientific justice by a judge.

To provide a test for the discordant evidence which, as we have said, is adduced in these cases, where both sides claim to be in the right, and both swear to facts which prove them to be so, Dr. Lushington has always shewn an inclination for affidavits or declarations made by the parties at a recent period after the events in question; and he has not cared whether these proofs have been made with or without a view to litigation, for they have had this value, they have been made by persons who have not yet seen their adversary's hand.¹ But the preliminary act was created to provide the same test in a better form, to give a man an opportunity of telling his own tale, varnished or unvarnished, in his own way, and to make him abide by the consequences, if there be any false lacker upon it.

In "*H. M. S. Inflexible*," Dr. Lushington addressed the Trinity Masters, upon this point, in the following words:²—"There is, upon the present occasion, a proceeding which has only recently been introduced into the practice of the Court, and which appears to me of very great importance; I mean, requiring the parties to give in, sealed up, so that no one sees it, the preliminary act, setting forth the particulars, from which they cannot depart. On behalf of the *Inflexible* it is stated (viz, in the preliminary act), that the Soubahdar was first seen broad on her port-bow, distant from about a mile to a mile and a half. *This is an admitted fact in the case, on which we must proceed.* It is important to tell you, that I shall never allow any evidence to be used to contradict a fact so stated—that is, from the parties themselves who make the averment deliberately." We have, in these sentences, an illustration of the mode in which the test has been judicially applied in discriminating the true from the false statement, where a false statement has been made.

The preliminary act must also operate beneficially in another form: it must itself extract the truth from the parties who subscribe to it. The questions comprised in it contain all the effective points of the case; and, according as they are truly answered by the plaintiff and by the defendant, there is a true plaint and a true defence. There is, however, a great probability that the

¹ Vide *Law Mag.*, vol. i., p. 57.

² The Admiralty Reports for 1856, p. 33.

assertions will be made in truth, because they are made, in most cases, when the impression of the facts is fresh and recent; and, upon this impression, the party takes a favourable view of his real case, as he has not yet had time to make critical and doubting reflections. And, above all, as he has had no means of seeing or conjecturing his adversary's exact case, he has little opportunity, and no temptation, to fabricate. Or, if he does so, his fabrication must be so wild and self-condemnatory, as to fail utterly in its projected mischief.

The reforms which we have had under our consideration are of a character to inspire us with the deepest respect for the judge by whom they have been introduced. We have in them the remarkable fact of a Court reconstituting itself in order to meet the wants and requirements of the times. And the Court has done so, *ex mero motu*, and without pressure from without; for no querelatory mention of it had ever been made either in Parliament or on the hustings, and grievance-mongers with the best noses had thrown up over so cold a scenting-ground.

ART. III.—LIFE AND TIMES OF EDMUND BURKE.

History of the Life and Times of Edmund Burke. By THOMAS MACKNIGHT, Author of "*The Right Hon. B. Disraeli, M.P., a Literary and Political Biography*;" and "*Thirty Years of Foreign Policy; a History of the Secretaryships of the Earl of Aberdeen and Viscount Palmerston.*" London: CHAPMAN & HALL, 1858.

THE announcement of a "History of the Life and Times of Edmund Burke," by the author of "*The Right Hon. B. Disraeli, M.P., a Literary and Political Biography*," and "*Thirty Years of Foreign Policy; a History of the Secretaryships of the Earl of Aberdeen and Viscount Palmerston*," had excited considerable expectations in the minds of those who were acquainted

with the previous publications of Mr. Macknight. These expectations, we venture to think, have not on the whole been disappointed by the volumes now before us. The same faults of style, the same rashness in pronouncing opinions on men and measures, the same tendency to indiscriminate eulogy and indiscriminate vituperation, which marked the former productions of the author, are no doubt to be found in the present work. To these peculiarities, which perhaps might have been anticipated, we shall presently have occasion to advert. But we have little hesitation in saying, that no one can rise from the perusal of this publication without feeling that Mr. Macknight possesses a thorough knowledge of the eventful times of which he treats, and of the opinions and conduct of Burke touching the most important transactions of those times.

That Mr. Macknight's is the best biography of the illustrious statesman whose life it records which has hitherto appeared, is perhaps not saying much in the way of commendation; but it is entitled to the still higher praise of presenting a most interesting, if not strictly impartial, history of that portion of the reign of George III. to which the present volumes relate. To some, indeed, it may appear that too much history has been introduced into what ought to have been more strictly a biography. But the truth is, so intimately was Burke connected with the events of his own times, both as an actor and as a thinker; so ready was he on all occasions to throw himself with full energy into the present; so intensely did he feel on every public question that arose; and so much of his life consisted in his speeches and political writings, —that it would be impossible to paint him as he was without a large and crowded historical background.

If there was a tendency in Burke's intellect towards speculation, as might be inferred from his earliest works, and from much in his subsequent productions, he no sooner set foot on the political stage than his vivid sympathies with humanity, as well as his personal ambition, kept him continually in action. In all the great struggles of the day he was to be found in the thickest of the fight. When not in actual combat he still kept watch and ward in the camp, looking with keen eye to the furthest verge of the horizon, and listening with quick ear to the most distant sounds. It is impos-

sible, therefore, to separate the life of Burke from his times ; and we think that Mr. Macknight was fully justified in giving the large space which he has done to the latter.

The great interest, too, which attaches to the political history of the period during which Burke flourished, and the lessons which it teaches to all times, may well excuse any minuteness of detail, or fulness of description, which Mr. Macknight has introduced. The proceedings against Wilkes, the taxation of the American colonies, the trial of Keppel, the no-popery riots, the obstinacy and bigotry of the king, and the servility of the king's friends, relieved as they are by the publication of parliamentary proceedings, the noble struggle of the Rockingham party, the rise of a spirit of liberty among the people, and, looking back at this day, we may add, the final establishment of American independence, still possess more than a merely historical interest. Both the evil and the good of that period have deeply affected the present condition of England, and have alike contributed to produce the wiser political views that now prevail. Nor are the figures which move on the scene less fitted to arrest attention than the events themselves. Chatham glowing with a patriotic spirit, and animating his countrymen by his noble eloquence ; Mansfield presenting, in the language of Erskine, " the awful form and figure of justice ;" Erskine adding new glory to the bar, and new triumphs to liberty ; Fox maintaining the cause of civil and religious freedom ; and Burke himself never resting from his labours with tongue and pen for what he conceived to be the right—have certainly not been dwarfed by any of their successors, but still maintain their high position among the great men of whom England may be proud.

It cannot, we think, be denied, that Mr. Macknight has described the events and characters of the times of which he treats with great vividness and picturesque effect. His writing is no doubt generally strong, his figures sometimes puerile, and his taste, we would venture to hint, subject to many of the infirmities of that of his hero. Nor do we think that the appearance of his work will absolve Mr. Massey from availing himself of whatever interval of leisure may be now allowed him, to proceed with his judicious and carefully compiled history of the reign of George III. Mr. Macknight, as a historian, does not belong to the school either of

Hallam or of Mackintosh. He is neither impartially severe, nor wisely lenient. He sees every thing through one medium, which magnifies alike what is good and what is bad. But still the work is well fitted to command the attention of all readers who take an interest in the political history of this country; and, if not likely to be eminently popular, will yet, it may be safely predicted, excite more general interest than either of the previous publications of the author. His attack on Mr. Disraeli, appearing, as it did, after that gentleman had fallen from his high official estate, and when there seemed little likelihood of his party again being in power, was somewhat repugnant to the national feeling against striking a man when he is down. His paradoxical attempt to show the identity of the foreign policy of Lord Aberdeen with that of Lord Palmerston, published when both these noblemen were in the same cabinet, had the appearance, to say the least, of being a tribute to present power. But both the merits and the faults of the volumes now before us will show conclusively, to all unprejudiced readers, that those were much mistaken who ascribed any unworthy motives to Mr. Macknight for the tone adopted by him in either of the publications to which we have referred. He treats the dead as he did the living; and, whether he blesses or curses, we believe that he speaks out of the fulness of his heart.

With Mr. Macknight's admiration for Burke we have much sympathy, and even where it exceeds the limits of sound reason, we have much charity for an error so natural and so generous. With all well-informed and right-thinking men there can be but one opinion of Burke's transcendent merits and noble character. His enlarged and intense sympathies—his active and disinterested benevolence—the comprehensive grasp and versatile powers of his intellect—the extent and depth of his political knowledge—his vast information, ranging over every field of inquiry—his lofty eloquence, "rich with the spoils of time," and bright with the most varied figures—his honourable and upright private character, and even the want of success, in the ordinary sense, of his public career, invest the name of Edmund Burke with the deepest interest to every one who can appreciate real greatness. But Mr. Macknight's admiration for the illustrious subject of his work, as is so often the case with biographers, is too much that of a lover

for his mistress, or of a devotee for his idol. He can see no faults—he will admit no shortcomings. He can compare him with others only for the purpose of depreciating *them*. The whole of Burke's conduct was in his eyes eminently wise, judicious, and consistent. Mr. Macknight is ready on all occasions to "say ditto to Mr. Burke." Even the oratory of Burke is not estimated by him on any sound principle, and no attempt is made to ascertain its real qualities, far less to show in what respects it came short of absolute perfection. According to Mr. Macknight, Burke was, as a speaker, on all occasions entirely successful, or, if any exception is to be allowed, it is to be ascribed only to the stupidity or malignity of his hearers.

Now, with all the admiration which we have for Burke, we must confess that we should like to have seen a more discriminative appreciation of his merits than Mr. Macknight has thought proper to present to his readers. Burke at least, if ever statesman could, can afford to be divested of all ideal attributes, and to allow his faults to be set off against his excellencies. This is the right and fair mode of judging of the life and character of every man that is born of a woman; and no height of merit in Burke can exempt him from being tried according to this mode by the high court of posterity. Enough would surely remain, after all reasonable deductions that could be made from the estimate, to satisfy every admirer of greatness, except a hero-worshipper or a biographer.

Take Burke as an orator. We are willing to look at his speeches in the form in which we now have them, and to pass over entirely any supposed deficiency in point of manner, or of the graces of elocution. We shall suppose them to have been spoken with the tongue of an angel. But is it possible, after reading those speeches with the care which they so well deserve, to entertain any reasonable doubt, that however the subject or the occasion might render his audience attentive to many of them, the style in general was by no means such as was likely to take with the House of Commons, and that, independently of other faults, some want of judgment is clearly discernible in the orator? Yet how full of interest and instruction are they, from the political wisdom, the felicitous thoughts, and fine allusions with which they abound!

In fact, the value which attaches to Burke's greatest efforts does not belong to them as speeches, but as eloquent expositions of political truths; and how they were received when delivered, matters very little as to any estimate that may now be formed of their substantial merits. Even with regard to those of his speeches in which the oratorical success is most striking, we may still concede to Lord Brougham, that "fierce, nervous, overwhelming declamation and close rapid argument"¹ are wanting, without being justly liable to be considered as disparaging the eloquence of Burke.

Again, take Burke as a statesman. We shall not insist on any exceptions that may be taken to the views expressed by him during that part of his career which his most judicious admirers love best to contemplate. Many of those who most warmly appreciate his great qualities at the present day, may well question the soundness of his opinions touching subscription to the Thirty-Nine Articles, and the wisdom of his views regarding the East India Company and Parliamentary Reform. Nor will his treatment of the more democratic friends of liberty be universally approved by those who are most alive to the value of his services to the state, and to his manly fortitude in supporting the good cause in evil times. But, passing over such and all other minor points, what are we to say on the theory of absolute perfection, to Burke's change of party in the latter part of his life? A late writer, Mr. Buckle, in his "*History of Civilization in England*," with as profound an admiration for Burke's ability and knowledge as even Mr. Macknight, explains the phenomenon, by supposing that the intellect of the great political philosopher became weakened after a certain period, and that it was even so far deteriorated that its efforts were brought within the comprehension of George III. Mr. Macknight adopts, as we take it, a different explanation of the matter. Although the present volumes conclude with the death of Lord Rockingham, the author has plainly intimated his opinion, that such as were the views of Burke during the American Revolution, such they continued to be after the French Revolution. Now, we venture to assert, that there is scarcely a proposition relating to the more essential principles of government

¹ Statesmen of the Reign of George III.—Edmund Burke.

to be found in Burke's later writings and speeches, which is not contradicted by something in his earlier productions. But, not to mention individual expressions, is it possible that any man can seriously maintain, after every allowance for the change of circumstances that can be reasonably required, that the spirit and tendency of the "Observations on the Present State of the Nation," and of the "Thoughts on the Causes of the Present Discontents," can be reconciled with those of the "Reflections on the French Revolution?" Can it be for a moment maintained that the views of the means and objects of government asserted in the former works, can be harmonized, on any rational and intelligible principle, with those set forth in the latter production?

Mr. Macknight has been at pains to show that Burke, though the advocate of religious liberty, and of economical and administrative reform, was never a political reformer. We admit that at no time did he support parliamentary reform; but neither did the other friends of Lord Rockingham, nor many others of the Whig party during the earlier part of Burke's political career. Yet what sentiment is more frequently and more strongly expressed in the speeches and writings of Burke during that period, than that the influence of the people was not sufficiently felt in the House of Commons? It is to this that he constantly refers as the cause of the evils which then afflicted the body politic. We are even distinctly told by him, in the "Thoughts on the Causes of the Present Discontent," that "it would be a more natural and tolerable evil that the House should be infected with every epidemic frenzy of the people, as this would indicate some consanguinity, some sympathy of nature with their constituents, than that they should in all cases be wholly untouched by the opinions and feelings of the people out of doors." Will Mr. Macknight pretend to say that Burke advocated the same principle in the latter portion of his life?

But, disagreeing as we do with the later views of Burke, we are not insensible to the consummate ability with which he defended them, or to the value of the political truths which he pressed into his service in support of an alien cause. Whatever may be thought of the object and spirit of the "Reflections on the French Revolution," no one can question the soundness of much

of the political philosophy introduced into that celebrated work, any more than the wonderful eloquence with which it abounds. On that mighty torrent are borne along the

“*Arma virûm tabulæque et Troia gaza per undas.*”

To the “*Reflections on the French Revolution*,” and his other anti-Gallican productions, what Lord Macaulay has stated generally with regard to Burke is strictly applicable:—“His reason, like a spirit in the service of an enchanter, though spell-bound, was still mighty. It did whatever work his passions and his imagination might impose. But it did that work, however arduous, with marvellous dexterity and vigour. His course was not determined by argument, but he could defend the wildest course by arguments more plausible than those by which common men support opinions which they have adopted after the fullest deliberation. Reason has scarcely ever displayed, even in those well-constituted minds of which she occupies the throne, so much power and energy as in the lowest offices of that imperial servitude.”—*Historical and Critical Essays*. Vol. I., p. 219.

Mr. Macknight, it appears to us, might well have thrown on one side all that was questionable in the views of Burke or in the policy which he recommended, and rested his high estimate of him as a statesman and political philosopher on those services which posterity has willingly ratified, and on those opinions which time has clearly confirmed. His book would, in that case, have been both more interesting and more instructive than it can be now regarded. It would have taught us to profit by the mistakes of Burke, as well as to appreciate better his real merits. It would have led us to judge more accurately of the great principles by which he was guided as the advocate of wise and liberal government, by showing the errors which interfered with those principles. Above all, it would have been more just towards Burke himself, by rendering his great qualities better understood by the generality of men, in making allowance for human infirmity and fallibility. Most readers of intelligence and independence of thought do not like to have the opinions of any man, however wise and eminent, thrust on them in the way Mr Macknight has done with regard to those of Burke, and are very apt

in such a case to give way to the feeling which influenced the citizen of Athens, who voted for the banishment of Aristides, because he was tired of hearing him always called "the just."

The character of Burke's political philosophy may be justly valued by those who do not admit the wisdom with which he applied it in every case. A simple enumeration of the measures of reform which he advocated, is enough to show the comprehension and sagacity of his mind, without claiming for him oracular wisdom. These have been so well summed up by Mr. Buckle, in the work already referred to, that we cannot do better than quote the passage:—"So far was this remarkable man in advance of his contemporaries, that there are few of the great measures of the present generation which he did not anticipate and zealously defend. Not only did he attack the absurd laws against forestalling and regrating, but by advocating the freedom of trade he struck at the root of all similar prohibitions. He supported those just claims of the Catholics which, during his lifetime, were obstinately refused; but which were conceded, many years after his death, as the only means of preserving the integrity of the empire. He supported the petition of the Dissenters, that they might be relieved from the restrictions to which, for the benefit of the Church of England, they were subjected. Into other departments of politics he carried the same spirit. He opposed the cruel laws against insolvents, by which, in the time of George III., our statute book was still defaced; and he vainly attempted to soften the penal code, the increasing severity of which was one of the worst features of that bad reign. He wished to abolish the old plan of enlisting soldiers for life; a barbarous and impolitic practice, as the English legislature began to perceive several years later. He attacked the slave trade; which, being an ancient usage, the king wished to preserve as part of the British constitution. He refuted, but, owing to the prejudices of the age, was unable to subvert, the dangerous power exercised by the judges, who, in criminal prosecutions for libel, confined the jury to the mere question of publication, thus taking the real issue into their own hands, and making themselves the arbiters of the fate of those who were so unfortunate as to be placed at their bar. And what many will think not the least of his merits, he was the first

in that long line of financial reformers to whom we are deeply indebted. Notwithstanding the difficulties thrown in his way, he carried through Parliament a series of bills, by which several useless places were entirely abolished; and in the single office of paymaster-general, effected to the country a saving of £25,000 a-year."—*History of Civilization in England*. Vol. I., pp. 419-22.

All these great attempts and great services of Burke, together with many others that might be mentioned, and all his sound views on legislation and government, recorded in his writings and printed speeches, surely form a sufficient title to the admiration of posterity, after every allowance for errors and inconsistencies which truth demands. Mr. Macknight, however, seems to think differently.

But our author's devotion to the subject of his work surpasses even the ordinary homage of biographers. He is not content with exalting Burke—he must also bring down other men. Whoever was disliked by Burke, or did not agree with him in his general opinions, or was even opposed to him in any matter, meets with but little quarter from Mr. Macknight. Every effort is made to run down Lord Chatham, and his great qualities are but sparingly conceded.¹ Charles James Fox is introduced to us in a sneering manner, although afterwards some acknowledgment

¹ We do not, we confess, fully understand, and, as far as we understand it, do not certainly admire, the following violent metaphor, under which the great commoner is presented to us, as he stood in 1758:—"The sacrament of blood, which both mob and ministers had taken for their despondency and imbecility after the loss of Minorca, had contributed to revive the drooping spirit of England; and a patriotic and fierce energy was kindled in the breasts of all who had partaken of that terrible communion. A great high priest, who knew not what it was to fear or to despair of his country, stood at her altar, and every admiral and general, inspired by the example, felt himself partaker in the same unbending resolution."—Vol. I., pp. 113-14. Mr. Macknight is no doubt aware that Pitt was strongly opposed to the execution of Byng. "Pitt," says Lord Macaulay, "acted a brave and honest part on this occasion. He ventured to put both his power and popularity to hazard, and spoke manfully for Byng, both in parliament and in the royal presence. But the king was inexorable."—*Historical and Critical Essays*. Vol. II., p. 186. Why then connect Pitt with the "communion of blood," by placing him at the "altar?"

is to be found of the merits of the friend and pupil of Burke. Lord Shelburne, of course, receives but scanty justice at the hands of our author. All the secondary actors, also, in the great political drama of that time, who were not the friends and followers of Burke, are treated disparagingly by Mr. Macknight. It is not, however, the substance of what he says, so much as the manner of saying it, which is offensive. Lord Macaulay's estimate of General Conway, for instance, does not differ materially from that of Mr. Macknight; but the former writer describes Conway with fairness, and judges of him by what he did, whereas Mr. Macknight's view of his intellectual and moral qualities seems to vary according to the changes of the relation in which he stood to Burke. This tendency, indeed, runs through the whole of the book, and we must say that it is a most unpleasant propensity, detracting greatly from the interest of many animated descriptions, and many important reflections.

Even to have published any statement or opinion with regard to Burke which does not quite please Mr. Macknight, is sufficient to secure his reprobation. Thus, the late Lord Holland is severely attacked¹ for having communicated to Moore, for insertion in his "Life of Sheridan," and afterwards himself inserted into Fox's "Memorials and Correspondence," an account, contained in an unpublished manuscript of Horace Walpole, of Burke, shortly before his retirement from office, on the death of Lord Rockingham, having called on Walpole and asked him to propose to his brother (Sir Edward Walpole), that the latter should resign the Clerkship of the Rolls, a sinecure office of great value, in favour of Burke's son, on condition that Sir Edward should receive its full yearly value, together with another office. Now, we are quite aware that Burke did not advocate the abolition of all sinecure offices in his speech on economical reform; and we are ready to make every allowance for a man, situated as Burke was at the time when the incident is stated to have taken place, and naturally anxious to make some provision for his son. But, surely, looking at all that Burke had professed with regard to purity, and to which, we believe, he had hitherto acted up, no circumstances can justify, however they may palliate, his conduct

¹ Vol. II., pp. 547-51.

in this affair ; and we really do think that Mr. Macknight goes too far when he puts Burke's proposal as a matter of right. Nor can we see any reason why Lord Holland should be held up as guilty of slander, and why the most unworthy motives should be ascribed to him, for making known a proceeding which he certainly appears to have believed to be truly related. As to all the recrimination against the Walpoles and the Foxes, in which Mr. Macknight takes occasion to indulge, it can neither vindicate Burke, nor prove the malice of Lord Holland.

Lord Brougham also is assailed¹ with much virulence by Mr. Macknight, for an opinion expressed by him relating to Burke, in an article which appeared some thirty years ago in the *Edinburgh Review*. His lordship had there stated,² that Burke ought to have earned his income in an honest calling, rather than have been dependent on the degrading obligations of private friendship, or on the precarious supplies of public munificence. "It is certain," he added, "that Mr. Burke chose rather to eat the bitter fruit of both these bakings, than to taste the sweet, the exquisite fruit of regular industry : hence he was a politician by trade—a professional statesman."

Mr. Macknight, having quoted this passage, enters on a violent tirade against Lord Brougham, and, to use plain language, attacks him in the most abusive manner. Now, on the view stated by Lord Brougham, Mr. Macknight was no doubt at liberty to form his own opinion, and to express it in his present work. On the whole, perhaps, it may have been better that Burke did not devote himself to a profession. The pecuniary support which he received from Lord Rockingham was, we think, honourable to both parties. For, whatever he derived from public munificence, he had certainly given services which money could not recompense. Nor do we consider it as any objection to Burke, that he was "a politician by trade—a professional statesman." Whatever might be the case in his time, it appears to us that, in the present *effete* condition of aristocratic politicians, and in the dearth of political ability among the trading classes, the country wants nothing so much as men who will make public affairs a profession,

¹ Vol. I., pp. 67-9.

² *Edinburgh Review*, Vol. XLVI., pp. 302-3.

and who will bring to the discharge of its duties the same ability and the same fidelity which distinguish other professions.

Had Mr. Macknight expressed his opinion on this matter in a temperate manner, we should not have thought it necessary to enter into any controversy with him. But temperance is not a quality of Mr. Macknight when he differs from any one on any matter that affects Burke. At once all the evil that is in him is roused into action—at once he proceeds to sting, although likely to injure himself rather than the object of his attack—at once he is ready to expose himself, if only he can show his venom. Mr. Macknight has, in the case to which we now refer, only laid bare his own folly. We do not choose to vindicate Lord Brougham against an assailant who uses such weapons of offence as those employed on the present occasion. But what, it may reasonably be asked, are we to think of the discrimination of an author, assuming to discourse on high affairs of state, who accuses Lord Brougham of “narrow sharpness?” And what are we to think of the qualifications of a man to write the life of a great statesman, who has thought proper to abuse the same noble and learned lord for having “enjoyed for a quarter of a century a comfortable retiring allowance as an ex-chancellor?” Certainly, if Mr. Macknight’s book were to be judged of by those parts of it which are justly obnoxious to criticism, it would be impossible to vindicate the terms in which we have already spoken of its merits. We have no desire, however, so to judge of it; and have only to express our regret, that a work so full of interest in other respects, should have been deformed by such obvious and grievous faults.

Putting out of sight those qualities of Mr. Macknight on which we have deemed it our duty to animadvert, we feel quite justified in saying, that no other biographer has so well described Burke in his domestic, social, literary, and political relations. We see him, through Mr. Macknight’s animated pages, in his own family circle, at the club, at Mrs. Vesey’s and Mrs. Montague’s, at Beaconsfield, in his study, and in the House of Commons. His noble and generous conduct towards Emin, Barry, and Crabbe, is described with admirable effect and in a sound spirit. His life of labour and watchfulness is set before us with the hand of a mas-

ter. On all such matters we feel that Mr. Macknight's language is not too strong, or his colouring beyond the truth.

All that is known, and, we fear, all that is likely to be known, of Burke's youth and earlier career, is well described by his biographer. On several matters he has thrown new light, and has fully established, we think, the mythical character of the story of Burke being a candidate for the chair of Moral Philosophy at Glasgow. With regard to the want of information relating to Burke during the first part of his residence in England, Mr. Macknight makes the following remarks, which may be consolatory to some juniors, both at the bar and elsewhere:—"After the glimpse of Burke (1751), as he is observing curiously the provincial life of England, with its waning Jacobitism, jovial parsons, and drunken squires, staring, vulgar, and laborious population, and the unmistakable indications of the manufacturing industry, which had taken root, and was about to strike forth with such gigantic shoots, we lose sight of him for nearly two years. But in a rising genius, the mere fact that little is known of his youth is quite as frequently a sign of good as of evil; it is a symptom of mental health and vigour, and must generally be the attendant on the formation of a truly great character. The precocious energy and restless desire for distinction which are sometimes shown by eminent men in youth, are not seldom mischievous in their effects, by preventing the mind from attaining that full development to which, in a quiet solitude, it might naturally grow. It is in the shade, and not in the sunshine, that all the hardy virtues expand. To the really great intellects of the world, early notoriety is no blessing, and a long obscurity no curse. The two first of Burke's avowed productions were so splendidly matured as to speak of the many studious hours he must have spent, and of which no other record remains."—Vol. I., pp. 62-3.

We can scarcely agree with Mr. Macknight in his view as to the extent to which Burke neglected the study of the law. The familiarity with legal doctrines and proceedings which he showed in his writings and speeches, and his mode of arguing on legal questions, would lead us to believe that, if he did not give the orthodox "six hours" to law whilst a student of the Middle Temple, he still acquired some knowledge of the learning of West-

minster Hall, and some, though certainly not all, of the best habits which a legal training produces. He proved himself more than a match on mere questions of detail even for George Grenville, who, in the words of Lord Macaulay, "had brought the industry and acuteness of the Temple into official and parliamentary life."¹ Lord Campbell has described Burke as "deeply imbued with the scientific principles of jurisprudence;"² and Charles Butler speaks in the highest terms of commendation of his report on the Lords' Journals relating to the proceedings in the trial of Hastings.³ Masterly, however, as the report was, all authority and all sound argument are against Burke's attempt to over-ride the rules of law respecting the admissibility of evidence in the proceedings referred to; but of this, and of his whole conduct relating to the memorable trial of Hastings, we shall have an opportunity of expressing our opinion more fully when the remainder of Mr. Macknight's work appears.

Of Burke's general habits of study, either at an earlier or later period of his life—of the mode in which he acquired those vast stores of knowledge from which he was able to draw on all occasions, whether for the purpose of argument or of illustration—comparatively nothing is known, and the result can only lead us to infer that the labour must have been great and unremitting. His powers of observation, whether as applied to men or things, were exact and discriminating; and in this respect, as well as in many others, he reminds us of Bacon. Nor were his reflective faculties, operating on the materials thus accumulated, less admirable; as is proved by his having reasoned out for himself the leading principles of political economy before the appearance of the "*Wealth of Nations*." He belonged indeed to that class of minds, undoubtedly the highest, which is more given to trace resemblances than to mark differences; and through this tendency it was, together with his peculiar temperament, that his intellect, running to the extreme which Bacon has pointed out, was chiefly led astray. We cannot but think, with due deference to Mr. Macknight, that a closer application to legal studies, than on any

¹ *Historical and Critical Essays*, vol. iii. p. 549.

² *Lives of the Chief Justices*, vol. ii. p. 443.

³ *Butler's Reminiscences*, vol. i. p. 131.

view it is possible to give Burke credit for, might have operated favourably on his intellectual character, and checked this as well as some other tendencies, which impaired the value of some of his efforts. No training would have operated more beneficially on such a mind as that of Burke, than the Spartan discipline of the law applied in all its rigid severity.

In all that Mr. Macknight has said of the private character of Burke we fully concur. All the ordinary modes of judging of human nature must be fallacious if we are to question his honour and integrity. The nature of the gambling transactions in India stocks, with which the *Burkes* have been charged, is, we think, satisfactorily explained by Mr. Macknight, and Burke himself completely exculpated. The whole mystery of the purchase of Beaconsfield, and of the expenditure in which Burke indulged, is fully cleared up. As to the charge of his being a concealed Jesuit, it could only have arisen from the most vulgar ignorance and credulity; but with regard to the imputation under which he laboured, of being the author of the "Letters of Junius," it is impossible not to feel astonishment at the quarters in which it obtained credence. How little must have been known of the qualities of Burke's intellect by those who could not rely on his honour and veracity! As Mr. de Quincey has justly said, "It is an absolute fact that Junius has not one principle, aphorism, or remark of a general nature, in his whole armoury. Not in a solitary instance did his barren understanding ascend to an abstraction or general idea, but lingered for ever in the dust and rubbish of individuality, amongst the most tangible realities of persons and things. Hence the peculiar absurdity of that hypothesis which discovered Junius in the person of Burke. The opposition was here too positively ludicrous between Burke, who exalted the merest personal themes into the dignity of philosophic speculations, and Junius, in whose hands the very loftiest dwindled into questions of person and party."

It seems obvious to us, however, that there must have been some sufficient cause for the unpopularity which Burke experienced more or less during his whole life, and for the circulation of such stories as those to which we have above alluded. The fault, we are inclined to think, was in himself, although Mr. Macknight ap-

pears to ascribe it to the want of aristocratical connections. Something might perhaps be owing to this ; but certainly not all. Looking only at Burke's speeches, it is impossible to resist the conclusion that, in his public capacity at least, he was not a person of a very conciliatory turn of mind, and that he was more apt, in asserting his own opinions, to make enemies than to gain friends. This tendency greatly increased in the latter part of his life ; but it certainly existed in some degree throughout his whole career. Nor can it be disguised that, however well he might understand the character of the English people, he never fully entered into their feelings, but remained to the last a philosophical Irishman. He did not possess those qualities of his compatriots which often ensure popularity in this country, and he had none of that English frankness and geniality which would have dissipated all suspicion as to his real character and motives with a people generous in its treatment of really great men. Even his manners in society, we fear, were not very much in his favour.

Burke was elected member for Wendover, through the influence of Lord Verney, during the Rockingham administration, and made his first speech in the House of Commons on the 29th January, 1766. The following is Mr. Macknight's account of an event which may be well called historical :—

“ It was on the 27th of January, when a great debate arose on the propriety of accepting the petition of the American Congress, that Burke first heard his own voice resound within the walls of St. Stephen, and astonished the House by his command of language, power of argument, and extent of information. It was on that day, when even Pitt listened with admiration to the young member's maiden speech, congratulated the ministry on the acquisition they had made, and praised him for his ability and ingenuity. And Pitt might well praise the new speaker. For it is somewhat remarkable that, in his first speech, Burke disagreed with the leading members of the Rockingham ministry in the House of Commons, and supported the view which their lofty rival afterwards took in the course of the same debate. This was the first time in which the States had come before Parliament in a federal capacity. To acknowledge such a union by

receiving this collective petition was regarded as dangerous, and the courtiers strongly remonstrated against the admission of such a document. The petition was presented by George Cook, member for Middlesex, and one of Pitt's followers; it was therefore supposed to have the great leader's countenance. By the administration this seems to have been considered as an open question. Dowdeswell and Conway objected to receive the petition. Burke took the more indulgent view of the motion, and at once drew one of those profound distinctions for which he was so remarkable. It had been said that, to allow a petition of confederate colonies to lie on the table, was contrary to the rules of the House, and subversive of its authority. The presentation of such a petition, Burke forcibly argued in reply, was in itself an acknowledgment of the House's jurisdiction. Then Pitt must have risen, and pronounced, at the commencement of his speech on the same side, his encomiums on the new member, about which so much has been said and so little can be known.

"It was a proud moment for Burke. The steady fortitude of years was at length rewarded. His first speech had been received with general applause; the gates of the temple of fame had at length opened, and Pitt himself had trumpeted forth his name. As hour after hour of debate wore away, and as Lord John Cavendish at midnight, to avoid a defeat, moved the order of the day, a little private exultation must have been felt by the member for Wendover, who had overcome so many difficulties, and now saw before him the boundless prospect of future greatness."—Vol. I., pp. 216-17.

The repeal of the stamp act by the Rockingham government was followed, shortly after the retirement of that ministry, by the revival of American taxation in a new form. Then began that great struggle which it was obvious to all wise observers could have but one result. No man understood the question, in all its bearings, better than Burke. In his view the taxation of the American colonies was not unconstitutional, as Chatham and his followers maintained; but it was opposed to all sound policy and all substantial justice. All his knowledge of those colonies, derived from his connection as agent with the state of New York, and from other sources, led him to believe that they would never

submit to what they regarded as oppression. His speeches, enforcing these views, abound with the most splendid eloquence and the most convincing reasoning, and still deserve the earnest study of every statesman who wishes to understand the principles on which government and legislation ought to be conducted. The question to which they relate is not likely to be revived in this country; but the maxims which they supply, and the political philosophy with which they abound, will be duly appreciated by all, except by those who, in the language of Sir James Mackintosh, "can recognize wisdom only in her robes and in her chair."¹

All these great efforts have been duly chronicled by Mr. Macknight, along with the other speeches and productions of Burke ranging over the same period. Of these last we can only allude to his speech on economical reform, perhaps his greatest effort both as an orator and as a statesman. Burke had previously made a general statement of an economical plan of which he had given notice, and great excitement was produced on the subject throughout the country in favour of his scheme. "For the moment," says Mr. Macknight, "he had become extremely popular. All England rang his praises. He was carried along with the spring-tide of this sudden agitation for economical reform. Conscious of the high position he occupied as the acknowledged leader in the movement, seeing that for once he was not hopelessly toiling against the stream of delusion, and feeling confident that the long parliamentary struggle would soon be crowned with success, his wit was at this time as playful as it was brilliant, and his temper more gentle than at any future period. Of this transient serenity in his disposition, the great speech, in bringing forward the motion which had caused so much popular excitement and expectation, contained many most pleasing indications." The speech was made on the 11th of February, 1760; and after giving a sketch of the plan proposed by Burke, which in substance has since been adopted, Mr. Macknight says:—"The bare outline of this scheme gives, however, no idea of the comprehensive spirit with which it was combined into one uniform system of economical reform. Still less does it give any idea of the wonderful variety of wit, anecdote, eloquence, and

¹ *Life of Mackintosh*, vol. i., p. 75.

poetic illustration introduced into that wonderful oration, which, as a whole, must be considered the most finished and brilliant specimen of its author's genius. It is that which, in the smallest compass, displays most amply and profusely all his intellectual powers; the boldness and originality of his proposed reforms, united with the calmest and most conservative wisdom; his vivid powers of representing the past in all the most alluring charms of the imagination; his astonishing flashes of wit, illuminating the whole subject, and blazing on every side with the most dazzling radiance; his ability for treating the humblest subjects of domestic and financial detail in the most fervid and brilliant language of the poet; his singular analytic skill; the closeness of his reasoning powers; the copiousness of his rhetoric, and the glowing fervour of his appeals to the nobler passions of his hearers.

"For three hours he held his audience under his irresistible spell. Ministerialists, courtiers, sycophants, sinecurists, all gave the most complete testimony to the orator's success. Tumultuous cheers and roars of laughter attended him throughout the course of his speech. At the close of his peroration, when he called on the Commons in Parliament assembled, to be one and the same thing with the Commons at large, and entreated them to throw aside the temptations of the Government, to return to their natural home, and to incorporate themselves with their constituents—it almost seemed, from the simultaneous burst of enthusiasm from all quarters, that the race of king-friends was extinct, that the House had no such characters in it as Rigby and Wedderburne, and that there were not nearly a hundred ministerial retainers, all of whose political aspirations extended only to the receipt of their next quarter's pay."—Vol. II., pp. 328-9.

One cause, however, prevented the immediate success of Burke's efforts in this, as in other schemes of reform—the cause which is mentioned in the celebrated resolution of Dunning: "That the influence of the Crown has increased, is increasing, and ought to be diminished." "This resolution," says Mr. Macknight, "expressed in a single sentence the moral of nearly all Burke's political history up to that hour. It pointed at once to the gigantic obstacle against which all his eloquence, wisdom, and patriotism, had struggled in vain."—Vol. I., p. 344. Dunning's resolution,

carried as it was against the influence of the Ministry, operated powerfully on the public mind, and opened the eyes of many, hitherto blind to the dangers which Burke had long seen. Lord North, however, whatever his own opinions might be, continued to support the fatal policy of the King towards the American colonies. With France and Spain combined against us, war was also declared against Holland ; and, although all expectation of conquering the Americans was now abandoned by every reasonable man, the King was still convinced that the cause for which he contended was just, and still trusted to the protection of Providence. The Ministry, strong in the favour of the Crown, still presented a bold front ; but the day of reckoning was near at hand. Cornwallis was forced to surrender to Washington at Yorktown ; and the war was ended in a manner not to be mistaken.

Nearly five weeks after the surrender at Yorktown, a hackney coach was seen on a Sunday morning, the twenty-fifth of November, leaving the door of Lord George Germaine's mansion in Pall-Mall. In this humble vehicle was the noble secretary himself. He was driving, during church-time, to communicate to his colleagues the disastrous intelligence which had just arrived at the War Office in Whitehall. He first called on Lord Stormont in Portland Place, and thence the two ministers drove to the residence of the Lord Chancellor in Great Russell Street. The bold Thurlow, though the keeper of the royal conscience, was not at his public devotions. These high officials jumped into the same hackney coach, of which the driver was at least in luck that morning, and the three ministers went in a body to the official residence of their chief, in Downing Street. The easy temper which had so often buoyed up Lord North, amid the ruin which his policy had inflicted on the country, at last gave way. He saw at a glance the enormity of the crimes he had committed. He saw that no royal favour could at last shield him from the deserved reprobation of all future generations in both hemispheres. He stretched forth his arms, and paced wildly to and fro, exclaiming repeatedly, in the deepest agony of mind, "O God ! it is all over."

All was not over with the Ministry, however. For four months longer they maintained themselves in office, in the midst of difficulty and perplexity ; Lord North, out of deference to George

III., being unwilling to let in the opposition, whose first acts, on coming into power, would, it was obvious, imply a condemnation of the infatuated policy which had been so long pursued. But at last, even the King saw that such a state of things could no longer last; and, through Thurlow, requested Lord Rockingham to explain his sentiments with regard to the formation of a new ministry on a comprehensive basis. The terms proposed by Lord Rockingham were moderate, and included, along with a few other things, the acknowledgment of the independence of the American colonies, and the adoption of Burke's plan of economical reform. Afraid to accept, afraid to refuse, these terms, the King equivocated. Lord Rockingham broke off the arrangement, and his Majesty began to threaten to retire to Hanover. Lord North, alarmed at what might happen, pressed his resignation on the King in a manner not to be misunderstood, and the King reluctantly consented to accept it. Lord Rockingham's second ministry was formed, and Burke took the office of Paymaster of the Forces. In three months from the formation of his ministry Lord Rockingham died, and Burke refused to remain under Lord Shelburne.

"Burke henceforth stands alone. From this time both his life, and his times in connection with his life, assume a new aspect. The hopes by which he may have hitherto been buoyed up—of redeeming, by years of fruitful enjoyment in office, his years of unrequited labour in opposition—were soon extinguished. As they expired, he devoted himself only the more exclusively to great philanthropic objects, far beyond the routine of the ordinary statesman, or the estimate of any mere political success. These labours require impartial treatment. They demand a candid, lofty, and respectful consideration. Any verdict pronounced upon them, from their supposed tendency to advance either Whigs or Tories to office, is likely to be unwarrantable. Yet they seem to be invested with a grandeur, beauty, and pathos, such as have hallowed the struggles of no other politician. Burke's sixteen years' exertions in the affairs of India, and the impeachment of Hastings; his writings and conduct, from the first outbreak of the great democratic impulse in France, to his final attitude, while contemplating that spirit of change and turmoil which was then

coming upon the nations, and has yet far from attained its final development; his busy retirement, with the frustration of his earthly hopes, and his heart-broken and desolate old age, attended with all his glowing interest in the business of mankind, and all the overpowering brilliancy and matchless vigour of his gigantic intellect to the last—may, I believe, form together a noble and instructive spectacle, equal, if not superior in interest, to any that his career has yet displayed. Having endeavoured to follow him faithfully through the great historical scenes which have already been passed in review, I pause at the natural termination of the period with the death of Lord Rockingham, and the close of the American war. I hope, however, soon to resume the task, in itself no ungrateful labour, and reverently to accompany Burke to that last sad hour, when, amid the convulsive throes of agonized Europe, he bade to all human affairs a loving, anxious, and eternal farewell.”—Vol. II., pp. 555-6.

Such is the conclusion of the present volumes of Mr. Macknight's work, and such the announcement of what we are to expect in that part which still remains untold by him of the life of Burke. We are anxious to part from Mr. Macknight on good terms; but we must confess that we do not look forward, in a very sanguine mood, to the history of the concluding years of Burke, written on the principle which his biographer has avowedly adopted. It is true, as he states, that the labours of Burke, which he has yet to narrate, require “impartial treatment;” but such treatment we are not inclined to expect that those labours will receive at the hands of Mr. Macknight. What we expect is, a zealous attempt to vindicate all that Burke did and said with reference to the memorable events amidst which the latter portion of his life was passed; and an unfair treatment of those who were the objects of his hostility, or who even differed from him in opinion. All the faults which we have pointed out in the part of the work now before us, are too likely to appear in an aggravated form in that portion which is still to come. Mr. Macknight has enough of ingenuity to make out a case in favour of Burke, and to give a plausible colour to his eccentricities. But in so doing, we are firmly convinced he will be unfaithful to the cause of truth, and will fail to render his work as instructive as it

might otherwise be. Nor is it a small evil that, having brought so much ability and knowledge to his task, he will have foreclosed the subject against any other writer who might be inclined to treat it in a more judicious and profitable manner. If these expectations, however, should prove unfounded—if the proceedings and views of Burke, which are considered questionable by many of his strongest admirers, should be fairly examined—if the impeachment of Hastings should be candidly discussed—if the real advantages of the French Revolution should be impartially weighed—and, above all, if men who acted an independent and honourable part should be treated with becoming respect, we shall be compelled to speak in still higher terms, and with still fewer qualifications, of the concluding portion of Mr. Macknight's work, than of the volumes which we have now introduced to our readers.

ART. IV.—TITLE-BOOKS *versus* TITLE-DEEDS ;

OR,

PUBLIC REGISTRATION OF TITLES SUPERSEDED.

A GREAT cry has been raised for Law-reform generally, and for the reform of the law relating to real property and its transfer in particular. This cry has become too universal to be passed unheeded by. An elaborate Report has been recently made by the eminent and learned commissioners appointed to consider the subject of registration of title with reference to the sale and transfer of land ; much interest has been taken in such Report, and considerable discussion has arisen upon the suggestions it contains. Indeed, there is no class unaffected by the questions mooted in that Report, from the highest to the lowest, —from the noble owner of the baronial hall of his forefathers, with its far-extending and luxurious estates,

“ With shadowy forests, and with champains rich'd,
With plenteous rivers and wide-skirted meads,”

down, through every grade, to the humble artisan, who, by means of his weekly subscription to the local building society, of a few shillings out of his toil-earned wages, erects a little dwelling for himself,

“ And, wondering man could want the larger pile,
Exults and owns his cottage with a smile.”

All, all are interested in the preservation of the existing right of the English landowner to do what he will with his own,—in the securing the enjoyment of every estate, according to the owners disposition of it; in the reduction to a minimum of the expense and trouble attending the transfer of estates, so far as this can be done consistently with those rights and that security; and, in a decision of the question, whether or not it is necessary or expedient that the private affairs and pecuniary necessities of every landowner and every houseowner should be publicly recorded and made common stock to feed the idle curiosity of his neighbours and the public. As such is the interest of every class, so it is the positive duty of every lawyer and legislator to examine and consider for himself, fully and carefully, the plans of registration suggested, before allowing any one of them to become law; and to weigh well the advantages and disadvantages of each system proposed, and to be satisfied that the former must largely and inevitably preponderate over the latter, before assenting to the introduction of such system.

The governing principle in every great measure of law-reform should be that of effecting the greatest possible amount of sound improvement, by the simplest means, and with the least violation of established rights. Most persons, however, who have thought upon the subject, probably agree that the advantages derivable from the scheme of public registration of titles, recommended by those of the commissioners who concurred in the Report just referred to, will not adequately compensate for the complication and confusion of titles, the new and extensive restrictions upon the present powers and modes of limitation of estates, and the other evils which must inevitably attend the carrying out, or attempted carrying out, of such scheme.

The proposition of the commissioners involves at the outset

this conclusion, that we have arrived at such a stage of moral retrogression that it is necessary to proclaim, by legislative enactment, that there is so little honour or honesty to be found in an Englishman, an English landowner, that he cannot be longer intrusted with the custody of the evidence of title to his own domain. But have we arrived at this stage yet? Surely not. At any rate, every other available means for reforming and simplifying the transfer of real property, and rendering titles secure, should be exhausted, before resorting to a measure carrying with it such a conclusion. That such means have not been exhausted yet, scarcely admits of a doubt; and had the powerful inventive faculties of the lawyers been directed, as long and as keenly, to the devising methods for the simplification of real property-law, untrammelled by the preconceived notions of public registration, as such faculties have been to the devising methods for working out impracticable schemes for such registration, some more satisfactory result must, we think, have been arrived at ere this. For many years past, as soon as any well-meaning reformer has set himself down to study means for the improvement of real property-law, he has inevitably stumbled upon the great but untried registration plans of those who have gone before him, and had his ideas so taken up with public registration, as never afterwards to be able either to think unbiassed by it, or to reduce it into a practicable measure. The fallacy with the commissioners, and with law-reformers generally, has been the too readily admitting the assumption, that real property law-reform means registration, and that registration must mean *public* registration. The commissioners were, it is true, appointed to consider the subject of registration, and from the circumstances under which they were appointed, it was only natural that they should conclude that the registration referred to them was public registration; they, therefore, very fully considered and reported upon two extremes—the present system of secret title-deeds, and the proposed systems of public registration. It is to be regretted, however, that more attention was not bestowed upon the question, whether an intermediate system might not be introduced with advantage and worked with effect?

The plan we have to suggest has for its object the keeping

within these two extremes; and, considering the eminence, talent, and learning of the noblemen and gentlemen who have already, at different times, directed their attention to the question of conveyancing reform, and the industry and care they have bestowed upon the subject without satisfactory result, it may be presumptuous for us to hope for better success. If, however, we should only succeed in suggesting a new and hitherto unworked channel for the minds of those more competent to the task, some good may possibly result from our labours.

In considering the relative values of different plans for registration, it is necessary to keep distinctly in view, the difference between those alterations or improvements which belong to the particular plan of registry itself, and those alterations of the general law which are common to, or admit of being engrafted upon, every plan of registry. Without this consideration many of the advantages claimed by the commissioners for their scheme will appear to belong to the registration part of it, but which in fact may be as readily effected by alterations of the present law without any registration at all; for instance, the public registration of the ownership of the fee simple in land is not necessarily connected with the abolition of tenancies in common, the virtual repeal of the statute of uses, the reconversion of all uses into trusts, or the vesting in the holder of the legal estate, power to sell and give a discharge for the purchase-money, recommended by the Report.

In sec. 4 of the Report, it is shewn that repeated attempts have been made to introduce public registration, from the time of James the First to the present time; and that upwards of twenty bills have, within the course of the last twenty years, been brought into Parliament for the purpose of establishing systems of registration, without success. In sec. 5, these failures are attributed to the practical difficulties inherent in, or likely to result from, a system of registration of assurances; and the commissioners infer, "that the fear that such a system would be productive of evils as great, or nearly as great, as those against which it was intended to provide, was probably the main reason which induced the select committee of the House of Commons, in 1853, to pause." When, then, it is considered that, in addition to

this, the public registrations proposed had to meet the general and natural distaste of the landowners to the public exposure of their private affairs, involved in the introduction of such systems, it cannot be matter of surprise that so little way was made with them.

The evils and inconveniences which must result from a system of public registration of assurances, in their present prolix forms, and the objections to such a system, are well and ably set forth in sections 17 to 23 of the Report. The objections are of seven kinds, and the statement of them occupies seven sections. Not one of these objections, however, applies to the system of registration we have to suggest.

The system recommended by the Report is that of public registration of *titles*. It is however manifest, upon the face of the Report, that this system is not free from all the objections urged against public registration of *assurances*, and will not effect all that the commissioners consider desirable to be effected.

In section 40, the commissioners state that the problem to be solved is this:—"By what means, consistently with the preservation of existing rights, can we now obtain such a system of registration as will enable owners to deal with land in as simple and easy a manner, as far as the title is concerned and the difference in the nature of the subject-matter may allow, as they now can deal with moveable chattels or stock?" * * * "But the question is, can this be accomplished?" A careful consideration of the Report induces the conclusion that the plan there recommended, in spite of every endeavour of the commissioners to the contrary, will be far, very far, from answering this question in the affirmative, and from working out the problem there set.

The commissioners (sections 40 and 71) assume, and correctly assume, "that no plan of registration will be acceptable or desirable, unless it leaves, substantially and practically, to the owners of land, the same powers of disposition and enjoyment, and means of protection and security, as those which they possess under the present system." A person may now, upon his death-bed, by means of legal uses, settle a thousand acres of land upon his wife for life, or widowhood, or during the minority of his children, with remainder to the latter, and rest assured that by no

amount of fraud or collusion on the part of the widow, or any trustee, or any after taken husband of the widow, by no imposition upon or victimisation of her, by no amalgamation of interests by means of her marriage with a trustee, or the appointment of an unworthy new trustee, can the testator's children be prevented from taking and enjoying the property at the appointed time; no trustee whatever being required. This security would, however, be swept away, along with legal uses, by the plan of the commissioners. Other instances readily suggest themselves, but this one suffices to show that the *sine qua non* of the commissioners is not complied with by their plan.

A system of public registration of titles might be introduced, without alteration of the general laws of real property, or the restriction of the present rights and powers over, and interests and quantities of estates in realty; but, to perfect such a system, the nature and extent of the interest of every person interested in an estate, must be judicially investigated, ascertained, determined, and recorded (registered), upon every death, heirship, testacy, intestacy, conveyance, mortgage, charge, lease, settlement, and in short upon the occurring of every act and accident which might possibly affect the interest of any person already having an interest, or which might confer an interest, upon any person not having an interest in the estate. Nothing short of this could make the system complete. A single glance is sufficient to shew that such a system would be so immense, the labour, time, and trouble involved in it so enormous, as to be utterly impracticable. The commissioners have evidently given it up in despair, and as the best substitute they could find, have proposed, not a complete system of registration of titles, but an incomplete system of registration of parts of titles; whilst by the same plan they make the parts of the titles proposed to be registered, namely, legal estates, the least important of any interests in real property, inasmuch as nearly all beneficial interests would be converted into mere equitable and precarious rights.

In this respect they have, unconsciously to themselves no doubt, made their Report unfair, inasmuch as they have contrasted the immense difficulties of a complete system of public registration of the present kinds of assurances, with the difficulties of a system

of public registration of legal estates, after such estates shall be shorn of all quantity save that of fee simple, and of all numbers of holders save those in severalty, and in an anomalous joint tenancy, sometimes without survivorship; and under which system there are to be no tenancies in common; and what is to be done with regard to the ownership of mines severed from that of the surface land, does not appear. It is obvious that, in order to compare the system proposed by the commissioners with that of public assurance registration, the assurances to be registered should be simply transfers of the estate of one tenant in fee simple, in severalty, to another tenant in fee simple, in severalty; and that, as these assurances might be as simple as the registrar's transfers of titles, these two systems of public registration contrasted in the Report differ only in name; and that the apparent advantages of the one over the other, are not due to title registration, but to the curtailment of the rights and incidents of real property.

The limits of an article, however, preclude our entering into the details of the numerous objections that present themselves at every stage of the commissioners' plan; we must, therefore, confine ourselves to a brief summary of the principal objections which occur to us, which are:—

The unnecessary publication of private transactions; and this, not merely as a matter of distaste, but as a cause of positive loss. Upon a marriage settlement the estate must be absolutely transferred to a third person, and thus the owner will appear to have entirely parted with his estate; and, if a merchant or trader, will have his credit injured, even if the only interest intended to be parted with be a reversionary estate, for the life of a lady older than himself, to take effect from his decease, if she survive him. Upon a mortgage, or a charge of a portion, the mortgage or charge must be registered; and in many cases this would be total ruin to a mortgagor if engaged in business, as, by means of the mis-called private trade circulars, notice of every mortgage and charge would be published throughout the length and breadth of the land. This would operate as a serious obstruction to loans upon mortgage, and would prevent many

mercantile men, in times and cases of emergency, from saving themselves by a timely loan upon mortgage of their estates, which, under the present system, can be effected without the slightest injury to their credit and reputation.

The injustice to creditors of a system, the avowed and main part of the operation of which, will be the publicly and systematically recording and holding out to the world, as owners of real property, persons who will have no beneficial interest in it whatever, and whose apparent ownership will be, simply and purely, a legal fiction.

The annoyance of unnecessary interference in private matters by public officers.

The expense of registration staffs and establishments, of journeys to and from registration towns upon every transfer, and of proofs of identity of parties and of properties.

The increased cost of every transfer of a small property.

The expense, trouble, annoyance, and uncertainty, of investigations, at registration establishments, of equitable rights and interests, if registered ; and the complete uselessness of the whole system, if these rights and interests should not be registered.

The same objection with regard to the suggested registration of leases, charges, and mortgages ; and the expense, time, and trouble of getting caveats removed.

New complications of titles and interests ; uncertainty as to all interests save those of the bare legal estate ; and the necessity of getting in the legal estate at every step, with the consequent necessity of Chancery proceedings every time a trustee or representative of a trustee refuses to convey.

The inconvenience and insecurity necessarily attendant upon the abolition of tenancies in common, and upon the annihilation of uses as distinguished from trusts ; and the retrograde motion of taking the rights and incidents of life estates, remainders, and reversions, out of the cognisance of courts of law, in order to throw them into Chancery.

The obvious absurdity of compelling ladies who have inherited their deceased parents' estate, as coparceners, to apply to a judge to compulsorily appoint a stranger to be registered as

owner, with power to sell and dispose of the estate.—(See sections 70 and 81 of the Report.)

The objections to and disadvantages of the commissioners' plan are therefore very serious, and it remains to be seen whether the advantages derivable under that plan may not be obtained by a system of private registration of assurances, which shall be free from these objections and disadvantages.

The rude outlines of a plan having for its object the attainment of such a system, without *necessitating* the alteration of any of the fundamental principles of real property law, but *admitting* of all such alterations of those principles as, independently of the question of registration, may be deemed desirable, we here submit.

PLAN FOR A PRIVATE BOOK REGISTRY.

1. **TITLE-BOOK.**—Instead of deeds affecting real estate being allowed to be made upon detached skins of parchment, no future deed (except a lease within section 12 post) shall be operative to affect real property (including in that term all hereditaments, both corporeal and incorporeal, and chattels real), unless engrossed in the title-book of the estate.¹ The title-books to be of a particular form and make, with numbered pages, to be defined. The books to be of two or of three different sizes, in order to allow of larger or smaller books being taken, according to the owner's requirements; the sizes, however, being definitely fixed, and each size containing a certain number of pages. The books to be of two different titles, the one "Freeholder's Title-book," the other "Leaseholder's Title-book." These books may be manufactured under the control of Government, with a particular stamp or water-mark upon each leaf, to imitate which may be made punishable as forgery. The leaves may, generally, be made of paper—some few persons will prefer parchment, and they may be accommodated.

Books with paper leaves will, no doubt, if properly made and bound, last as long as, or indeed longer than parchment deeds folded, but not bound. The expense of a paper book sufficiently large to last a century will, probably, not be more than the expense of the parchment for two or

¹ See Section 17, post.

three ordinary deeds. Large family estates will require the largest books, and under the present system the owners of such estates have to pay most for parchment. With regard to bulk, the title-book for the largest of estates need not be more bulky than an average bundle of title-deeds, requiring to be abstracted. The books at Doctors' Commons, in which the wills are copied, will give some idea of how much one book may be made to contain.

2. AUTHENTICATION.—In starting the title-book for each particular estate, the title-book must be authenticated by the seal of the county court, and numbered as of a certain number of that court's issue of title-books, and be signed by the registrar of the court. The only entry he will require to retain in his office will be that of the number inserted, and the name of the registrar, in order to preserve the numbers correctly. The title-books and such authentication to be obtained of the county court registrar upon affidavit, if a freeholder's title-book be applied for, that it is required for a particular property specified; that no title-book has been yet, to the knowledge of deponent, obtained for that particular property, or any part thereof, either alone, or in conjunction with any other property; and that deponent is entitled to the property for an estate of freehold in possession, or subject only to a term or terms of years, and that he holds the muniments of title to the estate in question, or that the muniments of title have been lost or destroyed, and that deponent is in possession or receipt of the rents and profits. Or, if a leaseholder's title-book be applied for, then that deponent is entitled to the property specified for a term or terms of years, in possession, exceeding fourteen years from commencement, and that no title-book has been, to his knowledge, previously started for a leasehold estate in the property in question.

These precautions may be desirable in order to lessen the probability of more than one book being obtained at first for the same estate; but the fraudulently obtaining several books for one estate will not affect the security of the title, inasmuch as at the starting of every conceivable system of registration, an investigation of the title prior to the commencement of the registry must be made before the registered owner's title can be depended upon; and this is prominently the case in the plan of the commissioners. The only parties who, at the commencement of the registry, can make a valid transfer in either a public or private registry, are those who can now make a valid assurance by deed. The title-book will, in fact,

when the first assurance is entered in it, be neither more nor less than one of the title-deeds to the estate; but, when subsequent assurances are entered, it will be the same in effect as if all these subsequent assurances were written upon the same skin of parchment as the first; and after the usual time for investigation of titles, prior to the first registration, has run out, there will then in effect be only one title-deed for each estate, save on subdivisions and amalgamations, notice of which, however, will be, as it were, indorsed upon the same one title-deed, as will be presently seen. Security against the suppression of particular title-deeds will thus be obtained.

3. A LIMITATION in point of time upon the power of multiplying original title-books to one estate will, however, be desirable; and a reasonable one will be, that, after five years, no *original* title-book shall be granted except upon application to the county court judge, in court, and upon satisfying him that no previous title-book has been started for the estate in question, in addition to the affidavit previously required before the registrar; and, after ten years, an additional proof may be required to the satisfaction of the judge, that the party applying is entitled to the title-book, and accounting for the delay, after notice to such parties as the judge may think proper.

This section only relates to the commencement of registration for each particular estate, that is, the starting the registry. As owners will be at liberty to apply for their title-books as soon as they please, it will only be from their own negligence if this section, mild as it is, ever affects them.

4. SUBDIVISIONS OF PROPERTY.—On subdivision of an estate after registry, a new title-book will be required for the subdivided part, to be distinguished from an original title-book by being called "Supplemental Freeholder's Title-book," or "Supplemental Leaseholder's Title-book," and to be obtainable from the county court registrar upon production of the original title-book, bearing a notice, signed by the owner having the custody of it, and witnessed by a solicitor, to the effect that the subsequent title to the part of the premises to be specified, is continued in a supplemental title-book. At the end of this notice the registrar must insert the number of the supplemental book, the name of the county court, sign it, and impress the seal of the court. The supplemental book will commence with a notice to the effect that the title is continued from title-book No. of the county

court of _____, and be dated and signed, and sealed by the registrar, and then handed, with the original title-book, to the party who produced the latter; and then the first assurance to be entered will, generally, be the conveyance from the owner who signed the notice in the original title-book. A similar course will be taken when an original title-book becomes filled up, but this need happen but rarely.

This section applies to subdivisions by deed, and partitions under orders of the Court of Chancery. On subdivisions by will, the devisee will not require a distinct book of title, until a document relating only to the subdivided part of the estate requires to be entered. It will be seen that the Registrar has nothing to do with the transfers or other assurances entered in the books; all he has to do with is the issuing the books, so that once a title-book is obtained, if no subdivision be made, it may not be necessary to have recourse to him again for centuries.

5. LONG LEASES.—The grant of a building or other lease, not within section 12, and not being a mining lease within section 6, shall be deemed a subdivision of the estate under section 4; and such lease will be engrossed in duplicate, one in the landlord's book, and the other for the tenant, in a supplemental leaseholder's title-book to be taken for the occasion.

We have thus assimilated the practice as to leaseholds with the present practice. The simpler plan would be to pass over leaseholds in silence, in which case no leaseholder's title-book would be noticed in section 1, and the present section would be omitted. The effect of this would be that every under-lease, and every assignment of the lease, must be entered in the freeholder's title-book, and he would thus always have notice of who had become assignee of the term, and liable for the rent and covenants; and this plan can still be adopted if required. We have treated these leases as subdivisions, in order to adhere as closely as possible to the present practice, and that the freeholder may not have his title encumbered with the numerous assignments and under-leases which may be made; so far, however, as the general plan of the register is concerned, it is immaterial which of these two courses is adopted. It will be seen by section 12, that the present section does not apply to short occupation leases.

6. MINES.—Under the present law, after land has been sold excepting the mines, or after the sale of mines in fee, or for a very long term of years without the surface land, the mine-owner may lie by for a century or two, and then exercise his right to the mines. The system of private registration now proposed, does

not necessitate any alteration in this respect, but admits of a restriction upon the mine-owner as to time, if required. If no alteration be desired, then upon any future severance of the mines, it may be dealt with as a subdivision of the property under section 4, present mine-owners being allowed to obtain a title-book for their mines as a separate estate; but if a restriction be thought desirable, it may be imposed in either of two ways—one by requiring the mine-owner's documents to be engrossed in the surface owner's title-book, without allowing the mine-owner a separate book; the other by allowing the mine-owner a separate book, but requiring him to enter up notice of his title in the surface book, say every thirty years.

7. **AMALGAMATIONS.**—Upon an owner becoming entitled to two or more estates held under separate titles, he may, if he desire to do so, amalgamate the titles by means of a similar process to that mentioned in section 4; the notes of the amalgamation being entered at the end of the last assurance then in each book.

This section must be optional, as it is very frequently important to keep titles to different estates distinct, in order to facilitate separate dealings with each.

8. **WILLS.**—It may be provided that wills shall not affect *bona fide* purchasers for value, from or through heirs, without notice after two years from the death of the testator, unless registered in the probate court, or in the title-book of each estate affected before the completion of the purchase; nor affect *bona fide* purchasers for value, from or through heirs, after ten years from the death of the testator, either with or without notice, unless registered in the title-book before the completion of the first purchase for value after such ten years. Where the will has been proved, it may be made sufficient registration of it in the title-book, to enter a note of the dates of the will and probate, such note to be signed by a solicitor, in order to have some guarantee that the note is correct, and that the will affects the particular estate. An heir, or volunteer through him, selling under an incorrect assumption of intestacy, must, however, be made responsible to the persons claiming under the will for the value of the estate sold.

There is at present great uncertainty in titles by descent, for want of some protection to purchasers against latent wills; the cases in which in-

testacy can be positively proved being very few. A provision to the effect of this section would remove most of this uncertainty, and be an improvement of the law, but it is not necessitated by the registry now proposed.

9. DESCENTS.—Another improvement, with regard to titles by descent, may be here introduced, by giving persons, claiming by descent, liberty to apply to the county court judge, and, upon proof to his satisfaction of the matters of pedigree desired to be established and recorded, to obtain an entry in the title-book, under the seal of the court, of the facts found; which entry may be made *prima facie* evidence in all courts.

10. NOTICE.—Every entry in the title-book to be universal notice of such entry, so far as the title to the property comprised in such book is concerned. Of course, where a supplemental title-book has been procured, no document entered in the original book, after the notice of the subdivision of the property, will affect the title to the part of the estate carried to the supplemental title-book.

11. BANKRUPTCY, &c.—No bankruptcy, insolvency, judgment *lis pendens*, order, or crown debt, shall affect an estate as against *bona fide* purchasers for value, without notice, prior to the time of its entry in the title-book, if entered within two years; nor whether with or without notice, if not entered within that time.

12. OCCUPATION LEASES.—Leases, agreements for leases, and agreements operating as *parol demises*, at rack-rent, for terms not exceeding fourteen years from the time of making, where the possession accompanies the document, may be safely excluded from the register; as purchasers can inform themselves of them by means of the tenants. This section should be extended to assignments of, and sub-demises under, leases within this section, notwithstanding that the estate may have become improved in value.

13. CONTRACTS.—In order to prevent the necessity of registering contracts, intended, shortly after the time of their being entered into, to be executed by deed, and, at the same time, to prevent titles being permanently affected by unregistered agreements, no agreements under hand only (save those included in

the 12th section), shall operate to affect real property, unless registered within a year from the making thereof.

The present law prevents these agreements from affecting purchasers without notice ; it is not necessary, therefore, to make any provision as to agreements registered within the year.

14. COPYHOLDS are of course excepted from this registry. This tenure has been too much improved already, or it would have disappeared long ere this. It is, however, gradually, though slowly, diminishing under the Enfranchisement Act. Legislation should be directed to the annihilation of the anomaly, by facilitating enfranchisements by the tenants ; and not to the improvement of copyhold tenure.

15. ATTESTATION.—In order to attain to some degree of regularity in the title-book entries, and to have their management somewhat under the control of responsible officers, every document and notice entered in a title-book may be required to be attested by a solicitor. Solicitors will be liable to be struck off the rolls, and may be made otherwise punishable for any malpractices by them, or in which they may be implicated, with reference to any title-book, or any entry therein.

It must not, however, be supposed that this will give to the profession any advantage over their present position, or over the position they would be placed in by the scheme of the Commissioners, if that were introduced. It is superfluous to mention that landowners do not now prepare conveyances or legal notices without recourse to their lawyers. Under the suggested plan of the Commissioners, the work, and therefore the profits, of the lawyers would be increased. The height of perfection aimed at by the Commissioners, is that of making land as easily transferable as stock. In a practical point of view, their own report shews this to be merely a visionary impracticability. It has, however, served as an election cry, and, like many other election cries, is but a delusion—a trap to catch a sunbeam—a lure for the votes of free and independent electors. Even stock, however, cannot be dealt with without a stockbroker ; that is, a person learned in the usages or laws of the Stock Exchange. It matters not by what name the agents are called ; there must always be work for the lawyers. Under the Commissioners' plan, expensive staffs of registrars and their clerks must be established throughout the country, to attend to a small part of the work—namely, the entry of such transfers of legal fee simple estates as may be brought to them ; some one must bring them ; some one must get up the necessary information and proofs : some one must

pay some attention, and devote some time, care, and trouble to the unprotected interests, the equitable estates, *cestuis que trust*, *femes covert*, infants, creditors, lunatics, etc., etc. Gentlemen engaged in business, in mercantile pursuits, cannot afford the time required to learn the details, or to work them out if they learn them; and, as a matter of pecuniary gain to themselves, must pay some one else to do this for them, in the same way that they pay the managers of the other different departments of their pursuits and businesses. A violent change may be effected, but every thing soon settles down to its regular course, and all classes, including the lawyers, must be paid for their share of the work of the great community. Progress, improvement, and progressional development, it is, however, the interest of the community to promote. The interest of the community at large is the true interest of every section of it, and therefore of the section called legal; and although a nervous lawyer may now and then be found, who fears he is about to be ruined at once, the thinking part of the solicitors know very well that their work cannot be annihilated by a single enactment. An act might as well be passed prohibiting war upon earth; and each, alike, would have to wait until the millennium, or the seventh age of the transcendentalists, before it could come into operation. The scheme of the Commissioners will fail, because, and because only, it is not unmistakeably calculated to benefit the community at large. Every other scheme for real property law reform, must ultimately stand or fall by the same test. To return, however, to this 15th section: Under it the solicitor will be doing simply the work that must be done by some persons other than the owners, the generality of whom will be incompetent to the task; in the same manner that a stockbroker performs his duties for others, and a registrar his; and a solicitor, acting under his responsibility to the court and to his client, is as much to be relied upon as, if not more than a district registrar with his irresponsible staff of clerks.

16. ALTERATIONS of, or tamperings with, title-books; alterations or erasures of any entries after signature, and the removal of leaves, may be made punishable as forgery.

The substitution of leaves is provided against by the stamp or watermark upon each leaf; see sec. 1, *ante*.

17. CUSTODY.—Subject to the rights, under the 18th section, of parties interested, the custody of the title-book to each estate may well be left to the persons who would, under the present system, be entitled to hold the title-deeds. This affords the basis for a provision to prevent the confounding of a subdivision of property under sec. 4, with a mere subdivision of extent of interest; so that no alienation, short of an estate of freehold for life, or for a larger estate, taking effect in possession, or subject only to

terms or a term of years (and which alienation would thus confer the right to the custody of the title-deeds, if it extended to the whole of the property, instead of to a part only), will amount to a subdivision under sec. 4 ; but without prejudice to sections 5 and 6. Thus the title-book of the owner of the first estate of freehold, will always be the title-book of the estate for all parties save leaseholders and mine-owners, who have obtained a separate title-book, under sections 5 and 6.

18. INSPECTION, &c.—Every person having an interest in the estate, may have conceded to him the right to inspect the title-book, and, by his solicitor, to place in it any assurance of his interest he may require to make or have entered ; also to have extracts furnished him ; also to have the title-book produced in support of his title, as occasion may require, upon payment of the costs of the solicitor of the party having the custody of the book, and a fee towards the expense of the book upon the insertion of a document. Such right, if refused, to be enforceable through the county court, upon application to the judge, and upon shewing interest, and that the application is made *bonâ fide*, if inspection and extracts only be required ; and upon also shewing, where an entry is required to be made, that it is a reasonable and proper one. In practice the inspection of documents is performed by the solicitor ; this right, therefore, may be extended to solicitors ; and, as purchasers are interested as soon as they have entered into an agreement for purchase, and creditors are interested as soon as they have obtained an *elegit*, or as soon as twelve months have elapsed from their registering a judgment, the right should be extended to them.

Beyond this it is not necessary to go ; and there cannot be any valid reason why registration should be made a means of publication of the contents of assurances to persons not having the slightest interest in them.

19. SECONDARY EVIDENCE.—If a title-book be lost or destroyed, extracts, examined and certified by a solicitor, may be rendered admissible evidence of the contents in favour of every one, save a person who may have wilfully destroyed the book.

This rule would, on the one hand, enforce care in the safely keeping the book of title by its custodian, and, on the other, prevent parties inte-

rested in an estate, and not having the book, from being injured by its destruction, as they could obtain extracts from it as soon as they acquired their interests; and, in addition to this, as solicitors generally retain the drafts of all instruments prepared by them, the practice would be readily introduced of examining and certifying the draft copy, upon the insertion of each document in the book.

20. **ENROLMENTS.**—Disentailing deeds and other deeds requiring enrolment in general registers, may, so long as those general registers are retained, be enrolled upon a copy, certified by a solicitor to be a true copy, being sent to the enrolment office.

21. **STAMPS AND SEALS.**—The documents may be stamped by adhesive stamps. With regard to the sealing the deeds—as it will be desirable not to raise the surface of the leaves either by wax, wafers, or embossing—an improvement upon those methods of sealing will be the use of a similar stamp to that in use at the Post-office for stamping letters. It will only require the word “seal” upon it, and will be very inexpensive.

22. **LOANS** upon deposit of title-books may be effected in the same manner as they are now upon deposit of title-deeds; and (in the words of the Commissioners), “it can hardly be doubted that, for the security of those who advance money under such deposits, the assurance that there could only be one title-deed to the property pledged, would be of much importance.” Loans upon mortgage of equities of redemption, and other equitable interests, will also be facilitated on account of their increased security, all of them being registered in the title-book of the estate; second mortgagees, and mortgagees and purchasers of equitable estates generally, will be guaranteed against being postponed to subsequent encumbrancers, obtaining the legal estate, as no subsequent encumbrances can be effected without notice of the prior dealings; and thus the number of cases forming exceptions to the maxim, “*Qui prior est tempore potior est jure*,” will be considerably diminished. A great advantage is here gained over the plan of the Commissioners. In the first paragraph of sec. 89 of their Report, they admit that their plan “will not directly tend to make equitable or secondary estates more marketable than they now are.” It would, in fact, make them much less so; but even the admission made is a grave one, in a plan which would considerably increase

the already large proportion and great importance of equitable or secondary estates.

23. MAPS are the best evidences of identity of parcels ever yet devised; they can, of course, be as readily copied upon the pages of the title-book, as they are now upon the parchment deeds.

24. SIMPLIFICATIONS.—Assurances will be shortened and simplified by the disuse, to a great extent, of historical title recitals, which will be rendered unnecessary, on account of the prior assurances being contained in the same title-book; and, by the abolition of covenants for production of title-deeds, every party, really interested, having a legal right to production, enforceable in the readiest and simplest manner, without a covenant.

25. FURTHER SIMPLIFICATIONS.—Assurances may be further shortened and simplified to a very great extent; several plans have been suggested with this view. The most feasible appear to be those having for their object the giving, by legislative enactment, implied covenants, powers, and provisions for those now generally inserted in the various documents relating to real estate. They will act, however, independently of each other, and entirely independent of the question of registration. Every provision will require the most careful consideration. Our space forbids our entering upon the discussion here; and, although the system of registry we have proposed presents great facilities and strong inducements for the introduction of these further simplifications, they are not necessary in order to the introduction of such system.

26. TITLES, *shortening time for investigation of*.—When we first sketched out our plan, we inserted the provision, which will be found in the note below,¹ for shortening the period over which the investigation of prior titles should be extended; and, if it be desirable to shorten such period, we think such provision

¹ If it be desirable to shorten the time for the investigation of titles, this may be done by a clause saving purchasers from all claims and interests, unless such claims and interests, or the documents under which they arise, have been dealt with or noticed in the title-book within thirty (or forty) years; so as in effect to require old claims to be re-entered up like registered judgments. A simple provision to this effect may be made to take an immense stride in the direction of lessening the trouble and ex-

will be found simple and effective for the purpose; and it is as safe as any hitherto recommended. We have, however, come to the conclusion, that the policy of attempting by any means to make the period less than sixty years is, at least, very doubtful; and that it cannot, by any plan yet proposed, be attained without curtailment of the right of disposing of property for estates less than the fee, or weakening the security of enjoyment of such estates as disposed of. Even the plan of the Commissioners, much as they have prided themselves upon its effect in shortening titles, and many as are the rights they have shewn themselves willing to sacrifice for its attainment, would not shorten the period for investigation of titles one single year. In their raid against legal estates for life, *pur autre vie*, in tail, &c., and against tenancies in common and in coparcenary, they appear to have overlooked some of the effects of terms, and have admitted to their registry, *leases*. This one simple item would upset the whole of their elaborate and complicated superstructure; and by it we may perceive that the Commissioners' plan would carry us so completely round the world, as to leave us just in the very spot from which we started, but with the addition of the trouble, vexation, complication, and expense incurred in the voyage. How could the necessity for investigation of prior titles be avoided, when leases, both in possession and reversion, would be allowed to be granted for hundreds of years? Out of these leases estates for years commensurate with certain lives could be created; and once a lease should be granted it must be subject to the usual incidents of a lease, and to the questions which would arise upon every devolution of the term; so that, in fact, while the scheme would exclude all the usual and known limitations of legal freehold estates, it would admit as cumbersome a system of limitations upon new and untried registered leasehold interests.

pense of investigation of titles. It would, in effect, be tantamount to the stipulation, so commonly introduced into conditions of sale, that no objection shall be taken to the title prior to a certain date; but with this advantage, that it would not only operate as against the purchaser, before completion, but would operate in favour of the purchaser, and against all the world, directly after completion of his purchase. This section, however, does not necessarily belong to the registration plan.

The Commissioners have tried to accomplish two things totally incompatible the one with the other—the annihilation of all estates short of the fee; and the indulging landowners in their English notions of estates less than the fee. Several plans have been adduced which show that the shortening the period for investigation of titles may be readily effected; but in all of them it is at the expense of life and other estates less than the fee. The notion of settlements has, however, become too deeply rooted in every English landowner's mind to submit to this; and this notion is not confined to the rich and the great; for there is not an artisan who becomes his own landlord, that does not require to tie up his little estate, upon his death, for the life or widowhood of his wife, the minority of his children, and, perchance, during the life of a child upon whose discretion he may not be able entirely to rely.

Nothing can be more simple than an ordinary conveyance from one tenant in fee to another tenant in fee, under the present law. (Of course we do not consider covenants for title part of a conveyance; they form extraneous matter which there ought not to be, and never ought to have been, any necessity to insert.) It is only when landowners voluntarily alienate their land for less interests than the fee that titles become complicated; and this would remain under the Commissioners' system, and again, their registration of the fee would not shorten settlements a single folio.

For the sake of a few pounds saved on the investigation of a few titles where the legal fee had been left untrammelled, they would render precarious the bulk of the titles to the landed estates of the kingdom. In order to make purchasers safe they would render every one else insecure. In reforms we are too apt to run into extremes. A notion was started that innocent purchasers should be protected; some safeguards were accordingly thrown around them; further protection was demanded, and, from time to time, the starting-point of caution has been more and more disregarded, until, at length, it would appear that no other interest than that of a purchaser is to be considered. It should, however, be remembered that if innocent purchasers, who can generally take care of themselves, require protection, innocent children, who cannot take care of themselves, should also have

some protection vouchsafed them; and so long as a testator is allowed to say that upon the death of his child, without issue, some other child or person of the testator's nomination shall take the estate, so long must the investigation of the prior title be carried back for at least sixty years; and we have never yet heard or read any valid and sufficient reason for attempting to restrain an Englishman from thus disposing of his estate.

The plan of registry, the outlines of which we have endeavoured to present, though very simple, would at once give most of the advantages of public registration of titles, and of public registration of assurances, without their evils or inconveniences, and without necessitating any of the sweeping, experimental, alterations in our real property law, involved in the plan of the Commissioners. Titles would be made safe; assurances would be shortened and simplified; loans, upon both legal and equitable estates, would be facilitated and secured; private affairs of private persons would not be ruthlessly published to the world; coparceners and tenants in common might still undisturbedly enjoy their legal rights and privileges; the securities afforded in settlements by legal uses would remain as firm as ever; suppression of title-deeds would be prevented without the aid of new and expensive registration staffs and establishments; gentlemen might still transact their conveyancing matters without travelling miles to a registration office upon every transfer; equitable interests would be rendered surer instead of more precarious; assurances and titles might also be further shortened and simplified, as well, and to as great an extent, under this as under any other system; in short, every improvement that could be required by the fastest, wildest, law-reformer, might be engrafted upon a plan, in itself and of itself the least revolutionary, and requiring the least amount of change or experiment of any system of registration that has yet suggested itself.

ART. V.—POINTS FOR CONSIDERATION IN CONNECTION WITH THE INDIA BILLS.

No. I. LORD PALMERSTON'S BILL.

No. II. LORD DERBY'S BILL.

No. III. TERTIUM QUID.

HAVING resolved that the government of India shall be transferred to the Queen, we have to provide for its administration.

First, then, of the predicament, which is somewhat of this sort:—The possession of a large separate empire, upon the preservation of which the *prestige* of Great Britain depends—the materials of which are such, that you cannot, as in the case of the colonies, remit to it its own self-government, nor allow of the introduction of its direct representation in parliament; so that you are compelled to relegate power to the Crown, which may have the effect of investing the Crown with a degree of influence inconsistent with the balance of the powers of the constitution of the realm.

The problem is now to provide an administration which shall be free from these consequences, and unattended with the evils which have been found to be incident to the double government.

It is conceded that the supreme government must be in the Crown and Parliament—that the chief executive officer must be a secretary of state—and that, for the variety of interests, of knowledge, of legislative skill, of financial ability, and local executive energy, there must be a council.

Why should we not walk in the paths of the constitution? Why not use the Privy Council, which the Queen can, by the rightful exercise of her prerogative, reinforce with every special aid that is requisite, fairly compounded of provision for a due regard to British interests, Indian interests, and the common interests of both; of British knowledge, Indian knowledge, and the common knowledge of both; of British justice and legislation,

of Indian justice and legislation, and justice and legislation common to both ; of British finance and works, Indian finance and works, and finance and works common to both ; and yet preserve a due distinction between the British state of things and the Indian state of things ?

To do this, two plans are put forward, both of which suppose a secretary of state chief of executive affairs and member of the cabinet, subject to parliamentary control, assisted by a council composed almost exclusively of Indians.

Both schemes appear to be constitutionally anomalous and practically defective ; to preserve, in some measure, the evils of double government, to keep British statesmen unacquainted with Indian affairs, and not to get rid of the evils of patronage, the vacillation of policy, the inattention and indifference, the official mismanagement, delay, and miscarriage, which are the objects of the special contrivance.

Why should we not follow out the general scheme of our constitution, and avail ourselves of things as they are ?

Why should we not use the Privy Council, the high depository of administrative executive functions ?

Already we have in the Privy Council, in the form of a cabinet, an administrative committee, charged with all matters of high policy, without, it is true, an assistant force to do its special work ; a committee of public instruction, charged with the cognizance of the means of education ; a committee of judicial matters, charged somewhat with the cognizance of Indian tribunals and Indian law (wholly, with appeals) ; a committee of trade and "plantations," which, but for the exception hitherto made, should include India, as well as the rest of the colonies and dependencies of the empire.

Now, the solution of our difficulty in this affair of the Indian government, as well as in the establishment of a department of justice, and the getting rid of many anomalous boards and offices (nests of patronage and irresponsibility), is the revival, or rather development, of the appropriate constitutional administrative functions of the Privy Council, and the appropriate executive functions of the ministers, secretaries of state, duly assisted in the former case by adequate and well-organized bodies of councillors,

and officers of record and advice; and in the latter case by ministers and heads of departments.

If the circumstances of India require that its matters of any kind should be kept distinct, that may be done by having a distinct (not distant) local habitation, distinct special officers, and distinct records; by a distinct sub-committee for Indian affairs, consisting of members of the above committees, with a special assistant secretary.

A mixed body of British and Indian statesmen, acting together, would enrich our public men with appropriate knowledge, and render the Indian statesmanship somewhat more comprehensive.

The passing of the different parties of the state through this course of statesmanship, would have the like effect on parliament.

While the policy of India would be as stable as that of the rest of the kingdom, which, according to all modern experience, has changed only in the order of progress.

Doubtless, to enable our public departments and our parliament to discharge their functions, both require internal reformation, partly by supplementing them with agencies for services at present unprovided for, partly by a better organization of the forces which they have, and partly by a more systematic recordation of the claims upon them, of the transactions which arise out of those claims, and the final acts by which the public are affected.

It is not sufficient to regard merely the chiefs, their relations and responsibilities; it is necessary to regard also the subordinate means which are assigned to enable the chiefs to be conformable to, and efficient for their purposes.

We must remember, that whether we will or not, Indian affairs must come before parliament, and must be decided upon by the intervention of British statesmen; and that the governing body of India, both in India and at home, without such sanction, will be hesitating and halting in its work, and produce but negative effects, though with probably a large admixture of excellent service.

The gist of the problem is the union of the two systems, in such a form and degree as not to mar either of them; and this effort is not the result of choice, but from the very nature of the case must be undertaken.

No doubt, English statesmen are ignorant of Indian matters, and Indian statesmen are too exclusively Indian. This, like the Indian mutiny, is a disagreeable *fait accompli*. So it is, and we must endeavour, by some transitional arrangements, to pass as rapidly as possible through this state to a better one.

It would seem that these transitional arrangements should comprehend British as well as Indian affairs.

And it may be done with the least departure from existing constitutional arrangements, and with the greatest probability of returning early to a normal condition, by having recourse to the Privy Council.

Such an arrangement would be exposed to the wholesome influence of public opinion ; while this new bureaucratic arrangement, half concealed from the public eye, and but occasionally brought under public discussion, would be at one moment neglected, and the next, from very impatience, pushed forward too precipitately.

The consideration which presses with most weight on the objectors to the amalgamation of the Indian supreme government, and the British supreme government, is the fear that the influence of the Crown, by means of Indian patronage, will preponderate in home affairs.

It would be odd to give to an administration the powers of government without the means of exercising those powers ; to impose responsibility without the choice of instruments by which the objects of responsibility may be fulfilled.

The free exercise of patronage has been abused every where. We are imposing restrictions by requiring that the subjects of patronage shall have the possession of adequate qualifications. We may proceed further. By duly organizing our offices, we may more easily assign to functions persons specially fit for them ; by augmenting the responsibilities of officers in every grade, we may give to them a common interest in the fitness of their assistants and their colleagues, and indeed of their chiefs also. Having done this, we may give to each chief in each grade in the hierarchy of offices, the choice of his own immediate assistant, with the approval of the higher chiefs ; and by varying the rule of promotion, so as to compound it partly of special merit of a

general kind, partly of special merit of a particular kind, and partly of seniority, sustained by a creditable performance of the duties which have fallen to the lot of an officer, we may reduce the evils of patronage to a minimum degree.

If, also, we introduce the principle and practice of courts-martial in a sort of courts-official, we may secure a high average of qualification and performance, and the rest must be left to that distribution of faculties which Providence has made among mankind, and to that spirit of generosity amongst us all (infused by the same creative hand), which disposes us to recognize and advance superior special merit, that has energy to make good its ground when opportunity is afforded.

To afford that opportunity should be a principal object of our institutions, as it is the salt whereby the effects of routine are prevented from becoming deleterious.

Some fear that the aristocracy will take all the patronage to themselves, and exclude the middle classes. If there be a tendency this way, and there can be no doubt of it, the battle must be fought, not evaded; and the right way to fight the battle is to insist upon a fairer composition of the peerage, a fairer composition of the government, a fairer means of winning distinction in public life; that there shall be no place without a serviceable purpose; that service shall be assigned to qualification of the practical sort, somehow or other in a proper way proved; and that all the services shall be organized, so as to provide both for extraordinary and ordinary services in due degree.

Some fear that we shall become mixed up with Indian finance. This is unavoidable; but the mischief may be counteracted, and Lord Palmerston's scheme frankly meets it. He requires, for some transactions, not only the Queen's sign-manual, but the counter-signature of the Chancellor of the Exchequer, and the Chancellor of the Exchequer is to appoint an auditor.

In point of fact, the government is to be transferred to the Queen; it will only be as constitutional monarch, whose acts of state must be performed through her ministers, and sanctioned by, or subject to, the sanction of parliament. And if that be so, the nation is committed to the work, and must pay out of one purse or the other—out of the Indian first, and if that fail, out

of the British. If we accept the *prestige*, we must accept the responsibility also : but being forewarned, we may forearm.

Let India, then, be at once and frankly treated, in the modified way we propose, as an integral part of the empire ; let it be governed by the same supreme government ; let the same cabinet preside over its administration in chief ; let the secretary of state, to whom its executive affairs are assigned, have the same executive force as other secretaries of state have ; and let the committees of privy council, and the subordinate special ministers, be charged with the same duties, in regard to India, as they are in regard to the other divisions of the empire. If their force be inadequate, develop it ; if their routine be slow, quicken it ; if their views be narrow and superficial, enlarge and deepen them ; if they are at present unfit for the service, make them fit ; recognize the evil and conquer it.

It is a stupid, weak sort of action, and the cause of much of the evil that exists, to evade the difficulty.

The other day we watched a debate on a financial matter, in which four or five chancellors of the exchequer took part, with great public advantage. If we would have statesmanship on most matters, we must include all kinds of public service in our regard, and give to the ins and outs in turn the incidental training both of office and of opposition.

If our statesmen were compelled to think at once of British and Indian interests, they would be taught by the considerations common to both, and by the broad contrasts of difference between them, the essential conditions of their subject-matter, and the true scope of British policy.

With statesmanlike leaders in parliament, would come statesmanlike members of parliament ; and public opinion, which is ever in advance, would readily give its aid through the intervention of the press, and subdue the factious tendencies of party men.

In this view we deprecate the disintegrating of our constitutional arrangements, and claim the obviation of the objections which have given rise to the peculiarities of the schemes of Lord Palmerston and Lord Derby, by modified arrangements at once adequate to the purpose in view, broad and comprehensive. Let us have one sovereign, one parliament, one administration, one

council of state, one executive force modelled after the same fashion, and because so modelled and aided by the same assistances of all kinds, and subject to the same external influences, acting in singleness of spirit and effective co-operation with each other.

This Indian government question opens out to view the enormous deficiencies of our official system in all its leading branches, and explains how it is that our governments are never conformable to, and efficient for, their purposes; nor able to accept new duties of an analogous nature, nor encounter any extraordinary work, nor afford any effective responsibility.

If our system had been in a fair state, Indian matters had not been as they are; and the project of incorporating its administration with the general administration of the country, even with the needful special modifications, had been an easy task.

The wise course would be to consider well the state of the parent tree before we engraft new branches thereon, after the fashion of the projects before parliament, or any project; otherwise our fate may be to find the new destroys the old. Let us first look at the state of the higher official organization of Great Britain and its needful developments, before we complete arrangements which we cannot readily alter, and which, to be effective, must be skilfully adapted to the other parts of our system.

Evade the difficulty we cannot; it will be prudent resolutely to meet it, but yet without rash precipitation and an unstatesman-like contemplation of momentary predicaments and influences.

ART. VI.—ELECTIVE PUBLIC FUNCTIONARIES.

WE have no concern in this place with the political proceedings of the times, the measures brought before the Legislature, or, in general, with what is called the occurrences of the day, unless in so far as the structure and the administration of the law is affected. These occurrences, as a learned, able, and faithful historian has observed, are apt to engross the undivided attention of the age, and, for the most part, to sink ever after into oblivion.¹ We trust that such may be the destiny of such bad proposals as we are about to comment upon, in the apprehension that the mischievous policy in which they have originated, may, if not duly considered and timely exposed to reprobation, be extended to other branches of our system, and affect especially the administration of justice, by twisting the frame of our judicature. We refer to the startling novelty of vesting in certain bodies of electors—five of the great mercantile or manufacturing towns—the appointment, in part, of those who are to conduct the Indian government. These towns are, by their vote, with others variously qualified, to choose a considerable proportion of the council in whom that government is to reside.

In principle there can be no difference whatever between making these executive officers elective, and giving to the same electors the choice of Under-Secretaries of State, or Lords of the Admiralty; nay, the Principal Secretary of State and the First Lord of the Admiralty, or the Secretary of the Treasury, or the First Lord himself. It is a transfer, *pro tanto*, from the Crown to the ten-pound householders of the power of selecting its ministers; and as India is not the only important part of the empire, nor its affairs the only department of state in which the community at large have an interest, there can be no conceivable reason why the newly discovered principle should be limited to this one branch of the executive government; or why election, hitherto confined to the choice of those who should represent the people in a deliberative council, should not extend to the appoint-

¹ Laing's *History of Scotland*, Preface.

ment of those who should rule them also. Elective monarchy has in all ages been regarded, in every country save one, as the worst possible form of government. The authors of the new invention are entitled to maintain that its vices flow in some degree from the peculiarity of the sovereign's position; and that the plan of elective ministers is not exposed to all the same objections. That it is, however, abundantly deserving of condemnation upon other grounds, we take to be altogether undeniable.

In the *first* place,—The important function of appointing executive officers ought, above all things, to be exercised under a strict responsibility. All who make any such appointments are answerable in their own persons for the honest, the diligent, and the able use of the discretion vested in them, except the sovereign, whose discretion is limited and controlled by the Parliament in its other branches, and, being known and constantly watched by the community, is subject to an effective virtual, though to no actual, responsibility. The body of electors is under no responsibility whatever, either actual or virtual; it has only an ideal existence as regards its conduct; it is, to all intents and purposes, wholly unknown; and may make the very worst selections from the worst motives, without the blame incurred falling upon any individual whatever. An arbitrary monarch may make wicked use of his power by corrupt or capricious appointments; but he exposes himself to the risk of some inconvenience, and even some danger, from the indignation of the people. The multitude may indulge in the most corrupt and capricious exercise of its power, without the possibility of either danger or inconvenience.

Secondly, The real selectors of the persons appointed are those who underhand propose them to the nominal electors; and who may not only have never given a thought to the fitness of the individuals for the office in question, but may, very possibly, be influenced by the most corrupt motives. In the choice of a representative, the political sentiments or public conduct of the candidates are the ordinary ground of support or of opposition; and on these matters the voters may have some capacity of forming an opinion. But of the duties to be performed in an office of which they can know little or nothing, they must be wholly

unable to judge; and, consequently, the party's fitness for the office they can have no means of estimating. They must, therefore, go upon the representation of the canvassers, whose real reason for urging the nomination must be entirely unknown to them. When a voter decides to support a candidate for the House of Commons, he merely resolves to be represented by that candidate, sending him to act for him as a member of the House. When he is asked to vote for a person as fit to fill a given office in the government, he must know what abilities, and what information, and what habits of business are required to execute that office. No two questions can differ more, or require more diverse qualifications to answer them, than "Whom do you authorize to act for you as your representative?" and "Whom do you think most fit to administer an office in the government?" A man of sense and of honesty may most consistently say he will have A. B. for his representative; but as to A. B.'s fitness for the duties of such and such an office, he is wholly unable to judge. The one question he can answer himself; the other he can only answer as C. D. tells him. The election of an office-bearer is, therefore, a mere farce and a sham. It is not in the hands of the town or its voters, but of some cabal—some knot of intriguers and jobbers.

But it is much worse than a farce and a sham; it must certainly, in the *third* place, lead to corruption. The place is sure to have influence connected with it; most probably there will be patronage attached to it; at all events, there must be influence—power more or less direct. The agitator, or the voter, or both, are sure to profit by the power which they are bestowing; and, while the purity of the election is sullied, the service of the state is injured. The traffic in writerships and cadetships which has long been known among the voters at the India House, and the directors whom they choose, will be naturalised in the departments of whatever description that shall be filled by the votes of ten-pound householders; and the opinions, or the prejudices, or the commercial interests of individuals who have influence in the town, will be found to affect the measures of the department, as far as the weight of the person selected for office is felt in that department, in which his voice must always count, and in which he cannot

fail to have the consideration arising from the body he, as it were, represents.

We may observe, in the *fourth* place, that such a mode of appointing to executive office has a direct tendency to divide the responsibility which ought to rest entirely upon the ministers of the crown. The bad practice which has of late years been introduced, in consequence of party divisions and the feebleness of successive ministries, of sending so many subjects of inquiry before committees of the two Houses, and regarding their reports as almost binding upon the legislature, has been lamented by all the best friends of the constitution, because of its lessening the responsibility of the ministers, and devolving upon parliament a portion of what ought to rest undivided upon them. But there is no comparison at all between that course of proceeding as a violation of constitutional principle, and the project, now for the first time conceived, of giving the people a direct share in the executive government, by vesting the appointment of the crown's servants, partially at least, in the inhabitants of burghs. To keep the different branches of the government distinct in practice, and prevent one from encroaching upon or interfering with the others, has ever been the aim of our wisest statesmen, as it is the very foundation in theory of our mixed constitution. The present is the first attempt to do that openly and directly which all have lamented to see brought about by accidents, or by the operation of influences which it was found impossible to resist; it is doing voluntarily, and without the least necessity, a violence to the principles of the constitution, which must inevitably be followed by other inroads. If, for example, this measure is intended as a concession to earn the favour of the popular constituencies, or reconcile their leaders to their exclusion from power, no one can be blind to the consequences which must result. Other towns will ask why they are to have no voice in choosing the holders of office; and even those to whom the privilege is granted as regards Indian government, will, not unnaturally, ask if that, as the only department of the state in which they have a deep interest, is to control, nay, to regulate, others, to fill which they are sufficiently qualified.

Various proposals have at different times been ventilated by

persons desirous of recommending themselves to popular favour, and but scantily informed upon the history of our institutions, by claiming what they termed the ancient rights of the people to a direct share in the government other than that which they justly possess through their representatives. That it has been asserted by such self-constituted authorities as Messrs. Cobbett and O'Connell, that the magistrates should be chosen as of old by the people, and not appointed by the crown ; that originally the popular interference in the administration of justice was not confined as now to those serving upon juries, is undeniable ; and that the freeholders both exercised large jurisdiction in the county courts, and chose both the conservators of the peace and the sheriffs, as they still do the coroners, is certain. But ever since the constitution has assumed its present form, all power of judicature has been vested in the crown ; the appointment of magistrates by one statute of Edward III., that of sheriffs by another ; and to propose now making justices of peace elective, would be as absurd as to propose that the peerage should be so constituted, because originally baronies were by tenure, and the transfer of landed property might operate the creation of a peer.¹

The extremities of popular frenzy in France led to the temporary destruction of justice by vesting in the people the choice of the judges. The execrable revolutionary interval in 1793-4 had its origin in election ; and the provisional government of the republic in 1848, by a formal decree, gave the appointment and removal of all judges to the multitude. This, however, was found to be an outrage upon the commonsense of mankind, which could not be endured even by the excited feelings of the Paris mob ; and the decree, the very worst ever made even by that despicable body, was speedily revoked, even before its own well-deserved degradation and perpetual expulsion from office.

¹ There still remains a vestige of the ancient right to appoint justices in the manor of Havering-at-Bower in Essex, and corporate towns choose their magistrates, London also choosing its sheriff.

ART. VII.—EVIDENCE OF PARTIES IN CRIMINAL CASES.

AFTER the complete success which has attended the great amendment of our procedure by the act for the examination of parties in civil causes, it was to be expected that Lord Brougham would take steps for rendering the measure complete, by extending it to criminal proceedings. He has accordingly presented a bill with this important view, which has been read a first time in the House of Lords; and, as time must be given for the full consideration of the subject, we deem it incumbent on us to take the earliest opportunity of laying it before our readers. How slowly legal improvement advances, and how fit it is that the greatest deliberation should be given to all proposals for a change in our long-established law of procedure, needs not be stated. The best law-reformers are those who, being well acquainted with the existing system, from long experience at the bar or on the bench, unavoidably have contracted a habit of leaning against any alteration of it, and we ought only to complain of this reluctance when it is carried too far. Lord Denman has admitted in a letter, with which we had permission to adorn and improve our pages,¹ that as late as 1848 "his mind was inaccessible to the very idea of a change" in the rule excluding parties; although six years before he had himself carried the important act abolishing the objection of interest to a witness's competency—a change from which Lord Brougham justly observed, that his bill of 1845, afterwards passed (in 1851), was really a corollary. We may be sure that he will find the same reluctance to adopt this corollary to his own act; but we entertain sanguine expectations that, like the former repugnance, this obstruction will cease.

The Bill is extremely short and simple. It provides that in all prosecutions, the defendant, or the husband or wife of the defendant, may, if they please, be examined upon oath, subject to

¹ *Law Review*, vol. xiv., p. 351. The whole letter, and the two which precede it, are entitled to the most careful study of all friends to law amendment.

cross-examination by the prosecution ; and it further provides that a witness, in any case whatever, shall have no right to refuse answering questions, upon the ground that his answer may tend to criminate him, but that the answer shall not be used against him, except upon an indictment for perjury assigned upon such answer. Into the discussion of the latter branch of the subject, self-crimination, we have entered upon former occasions (see especially *Law Review*, vii. 19, and xviii. 178). We propose now to deal with the former and more important branch of the measure.

That branch divides itself into two, as regards the objection likely to be urged against the proposed change ; the one head regards the receiving the deposition of the party prosecuted ; the other refers to his cross-examination by the prosecutor. Before entering upon either head of objection, it is fit that we call to mind the state of the existing law of procedure as regards both.

Nothing can be more wide of the truth than the statement that evidence of parties is excluded in criminal cases by the law as it now stands. On the contrary, that evidence is admitted in all or almost all such cases partially, and in a way to work great injustice, and to obstruct us in our attempts to arrive at the truth. The prosecutor is allowed to give his evidence in every case. No doubt this aberration from the rule of exclusion is supposed to be covered by the fiction that the crown is the prosecutor, and calls the party as its witness. But this pretence is put to flight by the bare mention of the word party. The real substantial prosecutor is the person injured, and who prefers the bill before the grand jury, and pays the expense of the whole proceedings ; or obtains, in the case of an individual, the aid of some body to carry on these processes, he either belonging to that body, or having a common interest with it ; or if the public prosecutes, and he is bound over, it is almost always because he is an injured party. In a few, and but a very few cases, the crown really prosecutes ; and in most of these few cases there is scarce one so connected with the transactions out of which the proceeding has arisen, that he has all the prejudice against the accused, and all the desire to see him convicted under which a prosecutor, both really and nominally such,

can be supposed to labour. But in the present discussion it is quite enough if we refer to the great number of cases in which there is a real party prosecuting in the name of the crown. Thus, a person is libelled, and proceeds by indictment or information against his adversary ; he is suffered to tell his own story, and, among other things, to deny upon oath the truth of the matter alleged against his character. It was only by a late amendment of the law that the defendant was allowed to give the truth in evidence, but he still is not permitted to give his own testimony ; and in many cases the facts are within the knowledge of none but the two parties. The law shuts the mouth of the one and allows the other to be fully heard ; and the one whose mouth is closed, might very possibly satisfy the court that he acted without motive, in circumstances shewing the highest probability of the charge being true ; or he may give such explanation as would rebut all suspicion of his bad faith. What is the consequence ? He may indict the prosecutor for perjury, and then the tables are turned ; his story is now heard, and his adversary's defence is shut out. They both might be convicted, one of the libel, the other of perjury ; the cross-examination of the original prosecutor having led to the means of contradicting him when prosecuted, although it might have failed to discredit him when prosecutor.

But this, if the prosecutor be a competent witness, is not the only instance of parties examined in criminal cases. Persons standing in the position of defendants, are every day both allowed to give evidence for themselves and subjected compulsorily to cross-examination. The court of bankruptcy and the insolvent court exercise in reality large criminal jurisdiction ; the former by refusing certificates and protection, whereby the imprisonment of the party is, in most cases, rendered inevitable ; the latter by direct condemnation to imprisonment as far even as for three years. Every bankrupt and every insolvent may, therefore, be regarded as in the position of a person upon his trial for a misdemeanour ; and while all he has to urge in his own behalf is fully heard from himself, he is subjected to a searching cross-examination, or cross-examination at least which ought to be searching, respecting every point of his conduct which is the object of suspicion

at first, and may become speedily, in the course of the investigation, the ground of a criminal charge. There is not a single reason that can be urged against the witnesses or defendants in any prosecution, which may not be urged against the whole proceedings in bankruptcy and insolvency, as far as the party's examination, the chief part of these proceedings, is concerned. Here, too, the cross-examination is compulsory; and, therefore, the measure proposed is free from a great part of the objection to which these proceedings are open, because it is not intended that the defendant shall be subject to cross-examination, unless he volunteers by tendering his evidence in his own behalf. We proceed to another instance of parties competent in criminal cases, and which more exactly resembles the proposed measure, because the accused volunteers his testimony.

In all motions for a criminal information the defendant is fully heard, and heard in the very worst possible way, upon affidavit. It is true that the question is not of his conviction or acquittal, but only whether or not he shall be put on his trial. But, besides that it is a most important part of the proceedings in all cases, every one knows how many never go beyond this first step; some, indeed, never can go further, as the motion for striking an attorney off the roll. When the motion is that he shall answer the matter in an affidavit, the court will not call upon him, if those matters are criminatory, upon the principle of preventing self-crimination; but they desire the motion to be changed into one for shewing cause why he should not be struck off the roll, because then he is not bound to answer upon oath unless he please; and he is at full liberty, if he please, to give upon oath his entire defence against the charges made, which may be, and often are, of offences amounting to misdemeanours; but, at any rate, the issue is the highly penal one, whether or not he shall be deprived of his professional existence.

The law which has now happily been introduced, of making parties competent witnesses in all civil cases, really involves the receiving testimony of defendants in cases to all intents and purposes criminal. The form of the proceeding may be an action for damages; but the issue really is, in many cases, substantially criminal. It is whether the defendant shall be fined, and, if at

all, how much, for having committed a grave offence against his neighbour. He may be charged with the foulest slander printed and published, with the most cruel and deliberate assault, with the most heartless plot or fraudulent devices to ruin a family, with a conspiracy to trick a trader out of his property, or a landowner out of his estate, or a patentee out of his invention ; and, in all these cases, if he is examined and not prosecuted, he is fully heard to defend himself against the accusation of violence trenching upon manslaughter, of calumny, of cheating, of forgery. What is the result ? The party injured, or who asserts that he is injured, takes care not to proceed for compensation if his case is at all doubtful, because he would be defeated by his adversary's deposition ; but he prosecutes, and is heard while his adversary's mouth is closed. Nay, incidental to the trial of many actions is the charge of fraud, and even of forgery. An ejectment is brought to try the title to a landed estate. The party in possession is charged with having obtained a will by foul means, amounting to fraud, and involving the moral guilt of forgery, and subornation of perjury ; or the claimant is met by a charge of producing interpolated, that is, forged parish registers, or false entries in family bibles. Here the issue is really criminal ; and on the question of his having committed forgery, as well as fraud, the party accused is heard in his own defence, and subject to cross-examination, exactly as the bill now before Parliament proposes that he should be, if the question of his guilt arose in a criminal prosecution. Nay, it may well happen (and in a late instance it did actually happen), that the party, after being heard as a witness in his own cause, may be prosecuted for the offence which he had denied upon the trial of the civil action ; and yet, when he is tried for the felony, he cannot be heard to utter a word while the prosecutor tells his story.

It is thus manifest that, far from excluding the evidence of parties in criminal proceedings, and proceedings of a similar description, and raising the same objection to the admission of such evidence, our present law and practice admit the evidence of parties, but in such a manner as is altogether unequal to the parties, giving the prosecutor all advantages, and withholding all from the defendant. Even if it were impossible to put both

upon the same footing, there would be some justice in excluding both from giving evidence, or in only hearing the one when the other was allowed to speak. But no one can doubt what must be the effect upon the prosecutor when he knows that his adversary's mouth is shut; no one can doubt that, if he knew he was to be followed by the defendant's deposition, he would in most cases give a different testimony.

Let it next be observed, we refer to the assertion often made upon this subject, that the defendant does give his account of the matter, and that therefore we cannot say his mouth is shut. No doubt he does, if he pleases, tell his story, as it is often called; but how? He is not sworn; and, what is often of more importance, he is not subject to cross-examination; hence what he says generally goes for little. But now and then it produces considerable effect; and if it owes much of this to the manner of the party, and generally to his demeanour, it owes a good deal more to his story being told without even the court sifting by cross-examination; and thus it often happens that too much influence is exerted by it upon the minds of the jury, which the proposed change in our procedure would prevent; because if any defendant renounced the benefit of the new law, and gave his unsworn and unsifted statement as under the old law, that statement would be of little weight.

Let us now ask if any reason can be assigned for hearing the parties where they are now competent—as the prosecutor in all cases, the bankrupt and the insolvent, the defendant in actions of tort, the party against whom a criminal information is moved for—any reason which may not equally be urged in favour of examining the defendant in all prosecutions, if he desires to be heard upon his oath and subject to cross-examination. Does not every reason given for refusing the deposition of the one apply with precisely the same force against admitting that of the other? But does not every such reason apply to the admission of parties as witnesses in civil suits? The interest which they have was always urged, and for many long years successfully urged, as a sufficient ground of excluding their evidence altogether. They are under a bias to support their cause; therefore they cannot be believed, and there is no use in hearing them; such was the

language triumphantly held ; and yet we now know that it was wholly unfounded, have legislated in utter disregard of it, and find by the admission of those who held it that we acted wisely, and that all experience sanctions what has been done. The same argument is now used, the same language held by the same persons against hearing the defendant ; and though the interest is greater, and therefore the objections may be somewhat stronger, in the case of the party criminally charged, the argument only differs in degree, for it is the selfsame in kind. Then let it be remembered, and this removes all the diversity just remarked between the two cases, or at least makes the one as strong as the other:—While the exclusion continued in civil suits, there was no injustice done between the parties ; both were excluded equally. But in criminal procedure the injustice is rank and glaring ; one party always competent ; the other always excluded ; and it may well be deemed to be the wrong party ; because, if any favour is to be shown, it ought rather to be towards the person accused ; the more especially, seeing that, by the course of our procedure, the charge against him is prepared behind his back, by a kind of decision against him on an *ex parte* statement, and which, from the importance of those who produce it, has considerable weight though known to be *ex parte*.

We have hitherto been dealing with the objections likely to be urged against the change, rather than stating the reasons in its favour ; but these are powerful, and they are unanswerable. The ground upon which parties in civil suits have been admitted exists here undeniably ; the investigation of the fact, the ascertaining the truth, and preventing erroneous decisions, the object of all the proceedings, is incalculably assisted by the amendment proposed ; and the greater importance of this, the more grievous consequences of misdecision in criminal than in civil cases, needs not be stated, or needs only to be mentioned, that all doubt may be removed. Let any one ask himself what he would most desire if falsely accused of an offence which he knew he was incapable of committing. He will at once answer—"To meet my accuser, tell all I know of the matter, under the sanction of an oath or solemn affirmation, under the risk of punishment for perjury, and, above all, subjecting myself to the most rigorous and sifting cross

examination." One conscious of guilt will not expose himself to this test of innocence. But it may be said that declining to take the benefit of the new law, will always be regarded as a proof of guilt. It will never of course be held sufficient for conviction; but if it works in doubtful cases to cast the balance against the accused, there can be no reason to complain on behalf of justice; for the only result is that the guilty have not escaped. It is, however, alleged that persons of weak nerves, and deficient in presence of mind, may either be deterred from exposing themselves to examination, or, if examined, may appear to be guilty when they have only been confused. The former case is certain to be of rare occurrence; the supposition is of a person innocent, and yet afraid of being interrogated; the protection of counsel and of the court may, from the other circumstances, be relied on for his escaping the inference arising from his refusal. That protection may still more surely be trusted in the latter case, aided by the fact of the party having submitted to interrogation, as evincing the consciousness of innocence. That a guilty person should escape by his possessing audacity, ability, and possibly experience in former trials, appears next to impossible when the effects of cross-examination, and the exposure of the press, are taken into the account; and his own former trials are likely to weigh more against him, than his dexterity thus acquired can weigh in his favour.

Upon the whole, we feel confident that Lord Denman, had he happily been spared to adorn and elevate the profession and the legislature, would, to use his own words in 1851 (*Law Review*, xiv. 212), have given his adhesion to the principle of Lord Brougham's bill, and tendered his vote for its further "progress." It may truly be regarded as forming a corollary from his own memorable act of 1842, or at least from that of 1851.

ART. VIII.—THE POSITION OF AFFAIRS IN RELATION TO JUSTICE AND LEGISLATION.

THE position of affairs, in relation to Justice and Legislation, corresponds with that in relation to all our other affairs. Both one and the other are due to the same cause, or congeries of causes. Therefore in treating of one, the other must also be necessarily regarded.

During the last chancellorship, we had to regret the postponement of legal and legislative affairs to the political (at a time, too, when the common feeling and common voice were in favour of legal reforms.) This state of things was attributable partly to the want of vigour of the late chancellor, and partly to the want of conception by other statesmen of the condition of legal and political matters, and the aid which the legal matters, considered constitutionally, may render to the political in giving them a due foundation.

Lord Cranworth lost an opportunity of exhibiting the highest constitutional statesmanship, and of vindicating his profession from unjust aspersions. We fear that that opportunity is irretrievable, for the predicament we labour under is not only of a worse, but probably of a more chronic character.

We shall endeavour to indicate some of the congeries of causes to which we have referred. It must be in a somewhat cursory and discursive manner; for the subject is too large and too various, and too little ventilated, to be disposed of in a direct and summary fashion. We must content ourselves with holding a free conversation on the subject, in order to incite persons of a practical turn to seek, beyond the range of their usual contemplation, the reasons for so anomalous a state of things as that exhibited in public affairs, and which so seriously troubles our own special interests, and the special interests of the community.

The nation seems to be in want of two things—a principle and a statesman; and to be collecting its material for a new effort, about which it has not quite made up its mind, and to be looking about for help in a state of great dubiety whence it is to come.

All parts of the body politic are in a scattered condition. It is not only in India that there is mutiny, but every part is in a state of insurrection against every other part, and against the whole.

We are dispersed and possessed of the quick intelligence of the ancient Athenians, asking news and criticising without stint, but slow to place ourselves in a condition of self-denial, and lend each a hand to the common purpose.

The statesmanship of the present moment is a system of collecting the wind from all quarters, without the skill of an Eolus, to put in constraint the force thus acquired in measures that shall win general assent.

Some while ago we observed upon the necessity of proceeding by organization of forces, instead of the fortuitous conjunctions of atoms which now go by the name of party.

Party we have none at the present time; and scarcely statesmanship. It is well that we who are in future to suffer so much amendment, should take thought of the means by which that amendment should be founded in principle, and consistent with a well-ordered development of our whole system of law.

To this end we think that Conservatives and Liberals should look to the constitutional proprieties, to the means that we have for doing the nation's work, to the need that there is for the development, the adjustment, and amalgamation of these means.

But first of all we must look for a principle co-extensive with the exigencies of the occasion, and that shall give to our statesmanship a foundation which may enable it to bear the shocks of tempest to which all political arrangements are subjected.

That principle we would find in the recognition of the claims of every class of the people, in the resolute disposal, one after another, of all matters under consideration, according to the order of their emergency.

Let us, as good men of business, make a list of all our creditors among the people, and of all the claims upon us in the shape of matters under consideration, and let us marshal these matters according to the principle just stated.

When the people perceive that their claims are recognised, and that they are postponed to those only which are of a pressing nature, they will wait patiently; and, in exercising their judg-

ment in this particular, will come to see how futile are some, and how disproportionate are others, and that, with regard to the rest, they may much advance their own favourites by giving a generous support to those of their rivals.

But nothing can be done till our statesmen shew themselves reasonable beings, and are willing to give place to each other in due degree and proportion. Our statesmen proper, our statesmen official, our statesmen lawyer, our statesmen merchant, our statesmen landed proprietor, are all bound, in advancing their own pretensions, to recognise those of other classes of statesmanship, and to seek to find a basis of action that shall prevent our parliamentary system from coming to a standstill, and to be a byword among the people and foreign nations also.

The predicament of statesmanship within the walls of Parliament is probably the oddest that ever was:—we have five sections, all equally powerful and weak, though varying in the numbers of their *personnel*. This *personnel* it would be good to anatomize, but our space and the nature of our publication forbid the wholesome work. It will be convenient, however, for the sake of a right view of the predicament, to have in distinct recollection the *personnel* of the several parties, and to con over their antecedents. Thus we have the *personnel* of the Derbyite party, about 160 strong. The *personnel* of the Peel party, weak in numbers, being some 18 or 20, but strong in personal ability and statecraft; the *personnel* of the Palmerston party, skilful in tactics, and the most numerous minority, but weak from collision with their natural friends; the Russell party, strong in doctrine, but weak in tactics; and the earnest independent party, bent on business, and recognising no form or system of things but as it tends to realize the claims of the people.

The pretensions of each party are, too, nearly balanced. They supply in each case what the others want, and so far have merit; but that merit is lost by reason of their respective defaults resulting from antagonism, or from jealousy, which indisposes them to recognise the supplemental merit which is wanting to themselves.

In this state of things we want a resolute man of will to give head in some one direction; and, availing himself of the simmering wisdom of the day, to concentrate the public energy in some

common purpose. Events for a few years past have helped us in this particular. Russia, the Crimea, China, India, have taught us one condition of our existence, that, as a state, we cannot live alone to ourselves, but must submit to external influences, if we do not by prescient policy forestal them. But, with the consciousness of the need, we do not discover in the statesmanship of the day ability commensurate with the occasion.

This view of things is filling many thoughtful men with alarm:—with the fear that, unless our statesmen become equal to the occasion, we may drift to the opposite states of imperialism and democracy; and that the only hope for us is to be found in the full recognition of the system and utilities of our constitutional arrangements, and the like full recognition of the position and claims of all, and the bringing into life a party of statesmen above the little ambitions that seem to animate the knots of rivals that pass by that name. There is nothing fills one with so much shame as the contemplation of the little greatness that at present occupies the field of politics—a greatness which does not arise from the inherent strength of the men themselves, but from the weakness of their rivals; a greatness which is not supplemented by personal strength, intellectual boldness, industrial effort, *prestige* among fellow men, and that high moral standard of thought, of feeling, and of action, that commands pre-eminence to those who possess it.

Germens of these desirable qualities we find among some of these men, but they are buried by the influences of smaller minds, which give the tone to the language of the day; and yet sometimes one is encouraged, by the national recognition of every good thing by the people at large, to hope that some men, catching their inspiration from the people, will take place among our statesmen, and supply the need of the time.

If we should succeed in obtaining, on the part of the nation, the full recognition of the position and claims of all, and a party of statesmen possessed of the like views, and animated by a like spirit; if, as an antecedent of this happy conjunction, there should come among us the full assertion of our own independence among nations, the frank recognition of the independence and claims of all other states, the frank adoption of what is merito-

rious in other systems, and a full measure of publicity within all available bounds; the politics of this country would take a broader and deeper character, and our small struggles about secondary measures and parish business would be succeeded by loftier principles and considerations, and more adequate results.

When the late Lord Chancellor undertook the consolidation of the law of this country, and in momentary enthusiasm prefigured the Victoria code, we half hoped that, as far as the justice and legislation of this country was involved, we should, by sure and gradual steps, obtain such a result, and that thenceforward there might grow up a habit of viewing our constitution at large, which would save us from the infinitude of small doings and endless contrariety, that mar all our efforts at improved legislation.

To descend to particulars, by the attainment of which all higher ends are to be obtained, we would that some means should be framed by bringing under view in a distinct form, either by the consolidation of the law, or by some other appropriate means, the recognition of the claims of all persons, of all proprietors, of all commercial persons, of all functionaries, of all suitors, by the best available state administration, by the best means of recordation, inquiry, and public instruction, by the best means of administration of justice and legislation, by the best means of administration of finance and special works, and by the best means of local administration, superintendence, and control.

We do not desire that our efforts should terminate with aspirations—with the complaints of discontent; but that in every case they should be followed by some practical result, fully realized in a satisfactory manner; and this must be done by men and measures, by the concurrence of the public sentiment and co-operation, and of the public authority and sanction. What obstructs our path? It is chiefly ignorance, and the busy trans-action of little things, instead of collecting all knowledge, of embracing its suggestions in a comprehensive practical design, and employing an adequate agency in an appropriate manner. We shut out suggestion lest our own schemes should be out-topped, and we deny aid lest our rivals should reach the goal before us. If we would find in other success a help to our own, a removal of a rival from the field, and a harbinger of welcome

to our plans, in the satisfactory completion of those of others, we should go on at a good pace, with the good-will of one another.

The practical action by which we would obviate this tendency to a divergent antagonistic method of action, and bring our public men to a common view of the whole matter of public concern, would be by a registration of all matters in a common form, so that place should be given with full impartiality to all views and all information, and then the sinister efforts of one-sided narrow people should be in a degree counteracted, by the reporting of all state papers—of all parliamentary papers—of all judicial papers—reports of all official papers—and of all public papers, in a like convenient manner; by the drafting, at the public expense, of every project of law, propounded by whatever representative, and by whatever class, in an uniform manner; by the consolidation of the law as it accrues; and by the revision of all recordation, whether of the law or other, after some method that should well try its accuracy and ensure its consistency and completeness.

Thus fair play would be done to every body; the common sense would be enriched; and statemanship, which is common-sense judiciously applied to matters of state, would be reinforced on all sides.

We lawyers are apt to look at our matters as if they were not matters of state; but as every individual finds his counterpart in the state impersonated in the sovereign, and as the collective power of the state is created to secure the aggregate and individual rights of all its members, there is no question so small or so insignificant as not to be matter of state; and nothing has so contributed to lower law and its practical dignity as the notion which has been sedulously cultivated, that lawyers are incompetent to deal with affairs of state, and that law is the affair of the lawyer and not of the statesman.

We shall never redeem our position till we have established a body of law and a body of lawyers, that shall in writing and in person demonstrate that the whole constitution is but an aggregate of legislation in practical operation through the agency of all our institutions.

And our lawyers in Parliament would do wisely to refuse to

entertain any proposition for change, till so much of the body of law as is directly affected by such proposed change has been brought distinctly under view by code, consolidation, or other instrument of exposition.

The failure of Lord Cranworth is due to the irresolute manner with which he worked out the idea which his speech of the 17th February, 1853, shewed he was possessed of. Such a failure will be a lesson to all chancellors, that the service to be given by the chancellor should be adequate to the high *prestige* of his office, and the rich guerdon of pay and pension with which the office is sustained.

It is clear that the people know the want, and we have reason to believe that the representatives generally recognise it; but it must depend on the chief administration of justice and law in the person of the chancellor, whether that want shall be supplied.

To Lord Chelmsford, an acute, ready, frank, and resolute person, the community looks for giving effect to the opportunity—not by his own hand or by his own direction—but by giving place and opportunity to those who are capable of aiding him, and by not calling upon the magnates of the law to give their sanction till the results of the labour of inferior workmen are in a state to take issue thereon.

There are ten practical pieces of work to be done before decisive action or proposition can take place, and they are the very means by which our statesmen (lawyer and other) and our representatives may prepare themselves for effective work.

The first is, to ascertain all the persons, subjects of the law, suitors for the benefits which our institutions are intended to afford. The second is, to ascertain the institutions which exist for affording those benefits. The third is, the history and state of those persons and those institutions. The fourth is, the records or means of public instruction in matters of public concern. The fifth is, the polemics and claims put forth and unsettled. The sixth is, the ascertainment and consolidation of the law. The seventh is, the financial effects of the present state of things, and the financial effects of the proposed state of things. The eighth is, the special work involved in the realisation of all fair claims, and the special means of executing those works. The ninth is,

local distribution of the claimants and the institutions. And the tenth is, the means of special official execution, superintendence, and control of the institutions, national and local, general and special, of the state.

These ten operations are the necessary preparations to any decisive statesmanship. Till the people and their governors have consolidated their information and their views on these matters, and come to a common understanding on the leading matters under consideration, our course will be a peddling one, and if it be protracted our fate may be disastrous; for the nation may be assailed when its counsels are distracted, and when, by ceasing to act with public spirit and vigour, it shall have lost all practical statesmanship, and have none to help it.

The manner in which the settlement of the government of India has been entertained, is an illustration of our general ineptitude. If there had existed among us the least amount of knowledge of what constitutionality is—of the fabric of our constitution and its framework—of the condition of patriotism, intelligence, and subservience of individual views to the common feeling of a free and energetic people—it is impossible that we could have erred as we have done.

But how few, even among statesmen, have the knowledge, beyond what they have picked up empirically in the course of their brief career! How few are familiar with the fundamental principles, purpose, tendency, and positive effects of the present state of the House of Lords, of the present state of the House of Commons, of the present state of the Privy Council, of the present state of the Judiciary, and of the present state of our Civil Service, and of the inability of these institutions to perform, not simply the duties which will devolve upon them by reason of the transfer of the government of India to the Queen, but even those duties which already belong to them!

Such is the state of the inorganization of these institutions, such the crowd of measures under consideration which paralyze their efforts, such the state of the records of information which they possess, such the want of appropriate and adequate means of assistance, and such their imperfect meaning, that not a single measure is ever produced well-founded in inquiry, and well-

ordered information, well-founded in principle and in consistency with existing institutions, congruous with the existing law, and so fashioned as to receive the incorporations of fresh matter, either during the progress of the measure through Parliament in the first instance, or by the accretion of statutory changes or judicial decisions.

We are come to that pass that it behoves us to make our stand and make no more law, and make no more institutions, or changes of law or institution, till we have ascertained what we have, and that not in a fragmentary haphazard way, but comprehensively and completely, in a masterly manner.

This collection of our materials is just the work suited to the present state of things, and just the work too which is most wanted and most indispensable to successful progress.

Let a man be Conservative, Whig, or Radical, he cannot do the business which he claims for his own but by a preparatory process of this sort, and he is but a pretender if he attempts to fulfil his adopted rôle by any other contrivance.

This is the only way in which he can ameliorate the present position of legislative affairs, and remove eventually the existing causes of legislative difficulties and failures.

On a recent occasion, Lord Derby remarked in answer to an inquiry of a noble lord, as to the intentions of the government regarding one of the thousand matters under consideration:—“He must remind the noble lord that there was a certain class of cases with regard to which they were all agreed that something ought to be done. There was no stronger exemplification of the truth of this remark than was afforded by the question of medical reform; for the members of the medical profession were not altogether agreed upon what was wanted, and their disagreement rendered it almost impossible to pass any satisfactory measure. He might mention as an analogous case, that when he was a member of the House of Commons he hardly recollected one year in which some member—generally a young and enthusiastic member—did not bring in a bill for a reform of the laws relating to the salmon fishery. They were always told there was a necessity for immediate legislation on the subject, and parliament was induced to interfere; but, as surely as a bill was passed in one

session, another had to be passed in the next to amend it. (Hear, hear.) Now he feared that this was very much the case with regard to medical reform. The law as it stood was certainly not creditable to the country," &c. &c.

The noble premier depicts a difficulty, but does not depict the cause.

The good old rule was to consider the state of things which happened to be the subject of legislation; the defects or grievances of which, complaint was made; the expedients by which such things had been remedied here or elsewhere, now or in times past; the expedients available at the present time and under present circumstances; the purposes to which it was politic or convenient to confine attention; and the enactments by which it was proposed to realize those purposes.

In considering any single matter, it was deemed by the wary conservative legislator proper to consider the whole range of our institutions and policy, and to take care that the proposed scheme of legislation did not overstep the modesty of the occasion, but strictly confined itself to the specific demand of the occasion, and so adjusted the terms of the enactment, that it might fit on with the existing law.

Then, as now, individual members pressed their peculiar views, and then, as now, succeeded by importunity and the prejudice of the day in accomplishing them, in spite of the remonstrances of the common lawyer, who found the statute law ever an intruder, and a noisome one, in his sphere.

But the people of past times had not the light of these days; they had not discovered the fatuity of legislation, and the expediency of resolutely resisting interferences with the free scope of commercial exertion.

We have become enlightened as to commercial matters; hoodwinked as to personal and professional; shewing, as all human experience has ever shewn, that each folly has its day, and *nemo sapit omnibus horis*, nobody is ever wise.

Legal rights, legal tribunals, legal procedure, legal forms, legal pleading, are all undergoing a multiplicity of legislation, and projects for amendment crowd upon each other in most seemly confusion.

Is there no ordering of these things, that we may know what we are about? that, when we have accomplished a good thing, we may have the means of preserving it against inconsiderate interference?

Is there no way of simplifying the arrangements of legislation, that men may be agreed upon what it is which they propose to mend or mar,—and may not in very blindness destroy what they propose to serve, and accomplish what they propose to hinder?

In judicial matters, we come to some agreement as to our case before we take issue on law or fact; we try our issues, we resolve, and, having deduced a practical result, determine.

In legislation we do not have recourse to any such expedient; we throw into the legislature a bill, to be discussed in heedless manner, as we knock about a football; and if we do not like a bill, heedless of the good that was in it, we take another, and so we proceed with a succession of bills till confusion becomes worse confounded.

It was humbly suggested about twenty-three years ago, by the author of "*Mechanics of Law-making*," that we should proceed after a different fashion; that every act of legislation should be preceded by a legislative report framed after one and the same method, in such a manner as to exhibit the state of the law, the state of the grievance, the history of past efforts, and the polemics of the subject; and that the matters should be so collated that every body might know exactly how the subject stood, and issue might be taken on the matters in difference.

Surely our course should be of this kind. We should lay siege in regular manner to the institution to be reformed, and, advancing by equal steps, bring our fellow-subjects and fellow-representatives to a clear view of the predicament, and the action properly consequent thereon.

If rival legislators should produce rival projects of law, we should thoroughly ascertain their provisions, and the scope of their operation on the existing state of things; and, the better to do so, we should assimilate all the projects to some standard form of recognised fitness, and thereby discover the points in which they agree and the points in which they differ; the matters wherein they are deficient, the matters wherein they are in excess;

and how far the whole may be amalgamated into one body of law, consistent with all the just purposes of the contending legislative suitors, and of the different institutions by whose intervention the objects of law are to be realized, as well as of the different parts of our constitutional system, whose singleness and comprehensiveness should be religiously preserved to the extent to which some exceptional exigency does not insist to the contrary.

Having ascertained in a formal and regular manner, by a proper officer, commissioner, or committee, these matters, and presented the results to the assembled legislature, its sense upon the points demanding its decision might be taken by means of resolution and instruction, specifically directed to such points.

This process would not be fast, nor is the present one, but it would bring out the results in a more deliberate and certain manner, and the wary course in one case would facilitate others, since principles of legislation, and a practice in conformity with them, would be evolved, and form eventually part of the common sense and common action of the house, and a guarantee against much reckless precipitation that now alternates with much tiresome and disheartening delay.

But for good work there must be good men; and Parliament must be content either by an improvement of its machinery, or by the employment of proper professional aid, perhaps by both means, to provide the means for executing the high work we have indicated in a becoming manner.

It is said that the committee for the parliamentary revision of current legislation is to be resumed. This proceeding will give opportunity to consider the subject, not only in connection with the criminal law bills of the statute law commission, which are to be referred to it, but with reference to the working of all our arrangements for the preparation, the discussion, and the passing of our Acts of Parliament; and for giving to Parliament the information necessary for its guidance in these transcendent duties.

Transcendent we say, for to make laws for generations of people, affecting their persons—their properties—their commercial transactions—and their functions of all sorts; as well as the

relation of the state, both to foreign states and its own subjects, and all the departments of its institutions—has influences and consequences of a higher kind than can be assigned to any other kind of human exertion.

We do not apologise for urging this truism, since the heedlessness manifested on all sides shews too plainly that it is well nigh forgotten, and yet it may be doubted whether the pressure of taxation, by means of bad legislation, is not infinitely greater than that which is imposed upon us in the direct form of taxation.

The primary object should be to bring the whole body of our legislators to one view of the matter before them. On a former occasion we recommended that there should be an exposition in Westminster Hall of the whole body of consolidated law, where her Majesty's lieges do congregate in attendance on her Majesty's courts at Westminster.

But possibly this might be inconvenient to members of Parliament. If that be so, there is room and verge enough in the spacious galleries and passages of the two Houses, and the use of them for notification is proved by some instances patent to every passer-by.

Many men who will not open the pages of a book, still less collate the different parts of it, will look at a plainly printed placard or broadsheet, and the exigencies of notification would force a regard to uniformity which the official draftsmen are not sedulous to observe. But it would be neither necessary nor desirable to obscure these notifications by minute detail. The purpose would be answered if they should be confined to the outlines of the subject, and the exhibition of the relations of the several parts. When such an exhibition had done its part in exciting attention to the subject, the detailed print would probably be referred to with an interest that would make the effort profitable.

We do not propound these things as having a place only in the mind's eye; we have on several occasions seen the expedient adopted with much advantage to one's self and others. It is not only the idle person, but the busy and preoccupied, to whom it is useful. As it is, few read parliamentary blue books, or the bills that are laid before Parliament; and of those who read, few

are able to understand them in the form in which they are presented.

If that form were always uniform for the same matters, and of a logical character, as indicated in the paper on "the recordation of the law for the purposes of promulgation, administration, and legislation," in the recently published *Transactions* of the National Association for the Promotion of Social Science, the most recondite views would be brought to the surface, and acquire the character of vulgar commonplace, with an effect corresponding to the effect which proverbs and maxims have at all times had among a people.

Let some sagacious minister, more regardful of the practicability of the method which he employs than the *comme il faut* which so enthral all modern statesmanship, require that all matters submitted for his consideration shall be presented in this way. It will save him a vast deal of labour in acquiring the knowledge of the contents of a variety of complicated measures, and save him not less labour in pointing out the inconsistencies and impracticabilities of such measures, most of which would be answered to the movers themselves in the attempt to reconcile their statements to the obvious requirements of logical exposition.

One of the immense uses of a code or consolidated body of law, would be to give us a synopsis of all the fundamental parts of law, and so far relieve the supplemental laws of matters already treated of with sufficient explicitness; while the framework of the parts of the code would furnish a model for the framework of its supplements, and thus diminish that part of confusion and difficulty which results from the adoption of different forms founded on no special principle or purpose, but the desire to make a distinction between the works of a rival and one's own.

We trust that the committee on the parliamentary revision of current legislation will make this matter one of special inquiry, for it lies at the very basis of all effectual consolidation of the law, which basis must be conformable to two essential conditions—that it be logical and convenient; logical wherein every premise or predicament takes precedence of its consequent, and both are in marked relation to each other and to their correlates, and convenient, wherein every thing finds a place conformable to the

requirements of the draftsman and the legislator, and all who are concerned with the incorporation of the annual accretions of law by statute and judicial decision. The jurist and the mechanist must equally regard the requirements of the other, and at the same time take care that the result realizes at once the purposes of the student, and of him who, by the pressure of his business or preoccupation of mind, is forced to avail himself only of a cursory reading.

We do not say that any thing essential is to be sacrificed for such objects; but they are to be had in view so far as they are consistent with fulness, accuracy, and clearness.

Suppose that such arrangements should be adopted for a few sessions, the member of Parliament would come to be ultimately informed of the matters submitted to his arbitrament; and, being informed, would feel an interest in things now repugnant to him, and from ignorance of which he is often made shamefaced when he comes in communication with his constituents and well-informed persons.

We need not say how much such facilities would advance the discussion of these subjects by the press, and thus lead eventually to a common understanding by the whole people.

We are apt to talk of a reform in Parliament; but, whether Parliament be reformed or not, it is needful that its business should be better prepared; and the excellent men of all parties, of all shades in opinion, and of every pursuit in life, should be enabled by all practicable means to render the assistance which unquestionably they can afford in an easier and more effectual manner.

The thirty years' war of public questions is a reproach to the age. That a generation should pass away while we are redressing minor grievances of which we are all aware, and when elsewhere every one finds a remedy the moment that it is found to exist, is an anomaly that one finds it difficult to explain, but by the supposition that the world is made up of two classes—those who are earnest, and those who are indifferent; and that the latter looks upon opportunities as matter of pastime, and the former as matter of work, but that the two are not to be found in co-operation.

The real truth is, that our statesmen do not stoop to details, but leave them to the helots, whose poverty compels them to work for their bread, and who are therefore despised. It is a pity that, at some period of their lives, our statesmen do not some piece of actual work, bringing them acquainted with the detail of the means by which that work is to be performed. The study of the law in *dilettante* fashion is doubtless of some use in giving them legal notions, but it is doubtful whether, by such study, men ever acquire legal ideas, still less legal faculties.

We do not say that the school of the practitioner is the school where alone such things may be acquired. The school of practice should be supplemented by the school of legislation, and the act of Parliament should be traced through all its phases of existence. In the court where the wholesomeness of its provisions is scanned, in the press where their wisdom is discussed, in the petition where complaint of oppression or blundering is set forth, in the instructions where the purpose is indicated, in the drafts where the material is elaborated, in the debates of the House where the principles are ventilated, in the committee where the provisions are mauled, in the office or place of business where effort is made to conquer imperfection and inconsistencies, and realize the fancied object. It is in all these places, and on all these occasions, that the merits or demerits of legislation are to be learnt, and it is to be feared that the task is of a sort too dry, and the eventual advantages too uncertain, to induce our statesmen readily to do this needful work at some period of their lives.

But if common methods should find their way into use, these studies and labours might be facilitated, and probably the day will arrive when in Parliament there may be furnished, partly by a committee on public bills, partly by officers charged with the special work of legislation, and partly by a code or consolidation of the law, making its scheme and scope matter of common knowledge, means whereby these hopes and fancies may become actualities.

Is there no member of Parliament honest enough, and bold enough, to avow his ignorance, and to claim that he and his fellow members should be placed at more advantage to do the work they undertake? No one desires that they should be drudges, while every body must desire that they, in common with

their fellow-subjects, should have such an amount of knowledge as would enable them to know in what country they are, and how to ask their way.

The funny state of politics owes much of its condition to this prevalent ignorance. Surface politics every body is acquainted with, but few with real politics, simply from the want of a prevalent knowledge of the soul and substance of politics, of its details and workmanship; and yet it would be difficult to say of any member that he is ignorant. He is up to every thing, but has it not scientifically and thoroughly, or, if he happen to have it, others have not, and he does not like to bore them with his knowledge, or if he did they would not listen.

Indeed details are not to be learnt by talking, and it is therefore that we seek to introduce more largely the method of presenting them to the eye as by a picture, that men may acquire it before they know what they are about.

We feel almost ashamed at the *empressement* with which we urge this subject; but the experience of a quarter of a century spent on the observation, of the hindrances of our legislation, has taught us that, next to the discovery of the appropriate methods of legislation, is the practical means of bringing them habitually under the eye of the legislator, without fatiguing or tiring him.

And as this is the medium through which the nation must have its laws, and without which all the jurists in the universe are of no account, it is of the last importance not to lose sight of any expedient that may be available.

We are among those who think that peers, members of Parliament, and statesmen of every degree, are very unfairly dealt with in these matters; but it must be admitted that the unfairness is very much their own fault, since they do not insist that the laws should be made as clear to them as possible.

They may say that they do not know how to set about the removal of the grievance. Let them require, before they pass a new law, that the existing law on the subject shall be ascertained. Let them require that the whole law on any subject shall be digested in one place. Let them require that the structure of the law in its common conditions shall be settled and uniformly observed; and that, before a law is submitted to them for adoption

or rejection, it shall be revised, in reference to such points as it may think proper to prescribe, by statute, by standing order, by instruction or example, so that it may have to deal with a matter, as far as possible, pure and simple. Let them prescribe, as indispensable conditions, that the cardinal rules of unity, uniformity, propriety, of comprehensiveness and completeness, shall be regarded.

In a very little while this difficult matter will settle down in a standard of universally recognised utility, and the process of legislation, beset now with so many needless difficulties, and discreditable failures, will become a facile routine.

We bystanders cannot fail to see also that, as our details of parliamentary business shall become better settled, and the incongruities of legislation are thrown out to view, incongruities will be exhibited which will challenge the discussion of matters upon principles somewhat too much lost sight of.

Our great men will recover their position and mastery, and the leaders in Parliament will reassume the weight and authority which are now denied to them.

This is a matter of common concern, for that such a nation as this should be without leaders is a cause of peril, not merely to our most precious institutions but to the state itself.

On this head, as if *à propos* to the predicament, the public press has come to discuss the state of oratory in Parliament, and seems to attribute the want of progress in public business to the absence of that qualification. We think that there is full as much oratory in Parliament as there ever was in any period of our history, and as there ever was in any body of Englishmen—that medley race—so shy and so energetic—so taciturn and so outspoken—so thoughtful and so practical—so indolent and so active—so much of every thing and so incomplete in every thing.

The true cause, we believe, and as we have often pointed out, is, that the orators despise the details of affairs, and the practical men despise the principles; and our statesmen never think it worth their while to study the requirements of business, till, by the turn of the wheel of fortune, and by the help of their oratory, they have found their way to office; and then, if they are wise, they become for a while the servants of the bureaucracy, and, if

foolish, plunge into schemes, the work of their own conceit, and inevitably destroy themselves.

When they have been in office, the fear of committing themselves stems the tide of their speaking, and they engage only in the great enterprises of parliamentary debate, on which the fortunes of party depend.

A little more mutual respect for one another's qualifications and attainments, throughout all sides of the House, would much advance the private causes of the competitors for power, and the public interests likewise.

We think our leading public men behave very ill to the secondary order of representatives, and very foolishly as regards themselves. If they consorted more with each other, and lent a hand in those enterprises which have not quite established themselves in parliamentary favour, to the extent of securing a full hearing to the mover, and developing the subject on well-established principles of legislation, without committing themselves to the entire objects and details of the measure, great questions would be much advanced, and a vast amount of debris, that chokes up the parliamentary ways, would be swept along and absorbed in more comprehensive views and measures, which the little measures would go to build up by their contributions of suggestion.

We believe that every party in the state is to blame for the present condition of affairs; and it might be well for us all to put on penitential garb, and reflect how far, by our individual indifference and *pococurante* criticism of every thing that is propounded, we do not discourage public men, and lead them on to a habit of like carelessness.

The subject is much too large to be dwelt upon in this place, for it involves nothing less than the outline of the state of the nation in the many phases of consideration that press for attention.

We are more critical than courteous, and, in cynical isolation, display our own consciousness of deficiency in carping at the failings of others.

This is the penalty which society pays for reducing all to its own standard of feeble conformity, instead of giving encouragement to every energy to develope itself, and moderating the

tendencies of each by bringing all principles and energies in competition.

The memorable examples of moral greatness and personal pre-eminence which recent times have shown, prove that this state of things is rather the result of social habit than of inherent defect of character in our people—an incident of civilisation which, in raising the character of the state, lowers that of the individual—an incident which, if suffered to endure in influence, terminates in destroying the state too, by depriving it of the vigour that it derives from personal excellence in its leaders.

We will not dwell upon the littleness of our present position, nor upon its danger. It is a characteristic of this country, that, whenever things appear as bad as they may be, the nation shakes itself, and meets the difficulty by corresponding energy of action.

We must not, however, count too much upon the ability to overcome risks by sudden efforts. The triumphs of modern invention are placing all peoples on terms of equality of advantage; and the day may come when, encumbered with a burdensome debt, the price of so many fortunate escapes, we may not be able to cope with a concentrated concurrent attack by a powerful alliance of jealous rivals.

A few numbers back, we urged upon attention that consolidation of the state, of our public knowledge, of our tribunals and law, of our finance and special agencies, and of our civil service, was the vocation of the day.

The miserable state of our preparation to encounter the India question proves, sadly enough, the truth of that position.

There seems to be little apprehension of what our constitution is; still less is our constitution in a state, either in point of men or in point of measures, to meet the call upon it.

Evidently we must no longer go on in piecemeal fashion, but in every thing look well to the whole predicament, and our whole means of meeting it; resolving never to undertake any matter without well knowing where it should find its place in existing things, and how both the new and the old may be incorporated, so as to make them work well together for their common purpose.

It is then in this large sense, and not as a merely technical

matter of convenience, that we urge so often and so earnestly the consolidation of the law of England; coupling with that imperial work its correlate, the consolidation of our tribunals, including therein our arrangements for instructing and training our statesmen lawyers, our judges, our jurists and legislators, and our men of business, and also the consolidation of our official civil service, upon the simplicity and comprehensiveness of which depend so greatly the simplicity and comprehensiveness of the law, and the intellectual, practical, and moral energy of our statesmen generally.

ART. IX.—NEW LAWS RELATING TO DIVORCE AND PROBATE.

1. *A Practical Treatise on Divorce and Matrimonial Jurisdiction, under the Act of 1857, and new Orders, with numerous Precedents.* By JOHN FRASER MACQUEEN, Barrister-at-Law. London: MAXWELL, 1858.
2. *A Treatise on the Law, Practice, and Procedure of Divorce and Matrimonial Causes, under 20 and 21 Vict., c. 85.* By WILLIAM BRANDT, Barrister-at-Law. London: BUTTERWORTH, 1858.
3. *Common Form Practice of the Court of Probate.* By HENRY CHARLES COOTE, Proctor in Doctors' Commons. BUTTERWORTH, 1858.
4. *The Practice of Probate and Administration under the new Statute, 20 and 21 Vict., c. 77; with the Rules, Orders, and Instructions, &c.* By C. W. GOODWIN, Barrister-at-Law. CROCKFORD, 1858.
5. *A Practical Guide in Obtaining Probates, Administrations, &c.* By EDWARD WEATHERLY, of Doctors' Commons. London: HURST & BLACKETT, 1858.

IT seems in these days to be a necessary consequence, that when important statutes are passed, many commentaries thereon should be forthwith published; either in the form of an "Edition"

of the statute, "with Notes and Copious Index," or in the more ambitious shape of a treatise embodying the new law. Numerous works, great and small, good and bad, useful or of doubtful and ephemeral value, are hurried forth by rival publishers; priority rather than perfection seeming to be sought after in the greater number of the cases we are referring to. Thus, law literature suffers oftentimes by the temporary character, incomplete treatment, and partial comment which an important subject receives; nor can we believe that the pecuniary profit from this endless making of books can, generally speaking, be considerable.

At the same time it must be admitted that, owing to the rapid and irregular flood of new laws, there are advantages to the practitioner and student in having well arranged for them statutes ill-digested and composed, as many alas are, when they come to receive the Queen's assent, after having previously undergone, during a session of parliament, the meddling and muddling process of alterations and amendments in committee, and suffered many things at the hands of pertinacious, crotchety, or ignorant members of the legislature.

The recent statute relating to divorce and matrimonial causes in England, and that under which the court of probate is established and regulated, deal not only with topics of vast importance; but from their nature naturally have provoked many editors to rush to the assistance of their weaker, more modest, or busier brethren, who, we think, are now sufficiently provided for.

With respect to the construction of the acts themselves, we suppose we must congratulate ourselves—considering the mode in which the laws are made—that they are no worse; indeed Mr. MacQueen, in his "Treatise on the Divorce and Matrimonial Jurisdiction," speaks of the Act of 1857 as a great and difficult measure, which "reflects credit on the government, and also on the opposition, in both Houses of Parliament." This charitable judgment—in which certainly, so far as the opponents of the bill in the Commons are concerned, we cannot coincide—proves both the author's amiability and the low standard of excellence which we are accustomed to take of the productions of our law-making machine; for if we may quote further the learned writer's language, we would say of this same statute that it is "very strangely

put together. The labours of the pitchfork are visible in every page. Things having nothing to do with each other are placed in juxtaposition. Things intimately connected are far asunder. Not a few of the clauses are puzzling. Sometimes they disappoint by doing too little, next they startle by doing too much. Often we are at a loss to comprehend why what is plainly before the eye is overlooked entirely."

And he adds further, that "already grievances are felt which a line would have obviated." Thus, *e. g.*, the clauses which were intended to give jurisdiction to the judges of assize are inoperative; and local relief, which was held out as a valuable characteristic of the proposed enactment, is as yet a thing unknown. Other and no less untoward flaws are mentioned by the author whom we have just cited, who, however, is willing to concede that, "nevertheless, with all its defects, excesses, and omissions, this act, the fourth attempt of government to legislate on the subject, if wisely administered, will be found to have many wholesome and many admirable capabilities." Amongst the "wholesome and admirable capabilities" can hardly be classed that arising out of the 59th and 33rd sections. The latter abolishes the action of *crim. con.*, while the former provides that the court may direct that the whole or any part of the damages recovered at the suit of an injured husband, may be settled for the benefit of the children, or maintenance of the wife. So, as Lord St. Leonards pointed out during the debate, a man may now, by the 33rd section, recover damages for his wife's infidelity without seeking for a divorce, and may continue to live with her upon these damages obtained from the paramour, which may be settled on her or the children; and, even when a divorce is obtained, the damages may be settled upon the children of the marriage, and the father may live with his children whilst they are maintained and educated with the price of their mother's dishonour!¹ Although this is (and ought not to be) a possible case under any provision of any statute, we think it is not likely that many instances of such a gross proceeding will occur.

¹ See Lord St. Leonards' remarks on this subject, in chap. xii. of his excellent little *Handy Book*, which, we are glad to see, has already reached the fifth edition.

The general objects of the recent alterations effected by the statute we are referring to, are too well known to be here adverted to. The crying evils of the old system—its gross injustice—its absurd anomalies and corrupt procedure, were too often the themes of the law reformers, and the subject of remark in this Magazine, to need recapitulation here. And no one who recollects under what circumstances the present measure was carried, need be reminded now of the silly superstitions which still survived, and had to be vanquished by vigour rather than be defeated by reason; nor of the formidable interests which had to be conciliated—the open and secret opposition which had to be met—the misrepresentations which had to be exposed—and the factious and determined combinations which, after inflicting damage on the bill, eventually succumbed to the indomitable force and skill of the Attorney-General during the session of 1857. It is an example too recent to be forgotten yet, of spiritual and social intolerance, and temporal greediness, which, although impotent to prevent the final success of the reform, were strong enough to retard and to cripple it in its detail.

Under such circumstances we cannot help perceiving that future amendments, both in principle and practice of this act of 1857, are inevitable. For example, the defect of the 27th clause may be cited. This section, while it gives the husband a right to a divorce from the wife in *all* cases of her adultery, gives remedy to the wife also; but limited in such fashion, that of itself this provision would demonstrate to any unprejudiced person to *which* sex the learned and virtuous members of the legislative assemblies belong. The right to a dissolution of matrimonial fetters is conceded to the wife, when her husband has, since the marriage, been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of adultery “coupled” with a certain amount of cruelty, or “coupled” with desertion for two years or upwards. In two other cases also, which need not here be specified, the remedy is extended to the weaker sex. Lord Lyndhurst moved an amendment on the clauses which we are now alluding to, with the intent to procure some more equitable consideration for married women. On his proposition being rejected, his lordship, in conjunction with four

other peers, entered on the journals of the House his protest; and as this able production contains, as we hope, the material as well as the reasons for future amendment of the law, and is moreover, in its statesmanlike view and felicitous language, a very remarkable document, we shall here present it to our readers. The grounds, then, of Lord Lyndhurst's dissent from the majority are as follows:—"1. Because the effect of rejecting this amendment will be, to confine the dissolution of marriage upon the adultery of the husband to the cases stated in the bill, which we consider to be not only inexpedient, but, as contrasted with the relief upon the adultery of the wife, partial and unjust.

"2. Because, as the clause is framed, although the husband should be living in the most open and notorious adultery, and should even bring his mistress into the family residence, insulting the wife by her presence, and should endeavour by ill-usage to compel her to submit to this disgrace, such a case would not come within its provisions.

"3. Because the adultery of the husband, accompanied with the commission of the greatest crimes, and even the most infamous vices, would not entitle the wife to relief under this clause.

"4. Because the adultery of the husband, although coupled with his condemnation to penal servitude, even for life, and the consequent degradation and misery of the wife, would not, under the provisions of this bill, enable her to obtain a dissolution of her marriage.

"5. Because many other cases of similar injustice and hardship are excluded from relief under this clause.

"6. Because to allow a divorce for the adultery of the wife, and to refuse it in these and other cases of adultery by the husband, coupled with acts of deep injury inflicted upon the wife, is manifestly unjust.

"7. Because, although the adultery of the wife may lead to the imposing a spurious offspring on the husband, and entitle him to a divorce for a reason which would not apply to the case of adultery by the husband, other circumstances may, and frequently do, occur in connection with the adultery of the husband, giving the wife an equal claim to this remedy.

"8. Because no distinction is made in Scripture between the

case of the man and of the woman in the commission of adultery. The sin is the same in both—both are included under the same prohibition.

“9. Because the whole tendency and spirit of the Christian religion is manifestly calculated to raise women to equal rights and equal responsibilities with men. ‘It has,’ in the words of an eminent writer on general law (Chief Justice Story), ‘elevated women to the rank and dignity of an equal, instead of being an humble companion or a devoted slave of her husband;’ and accordingly we find that, as Christianity extended itself, and its influence was brought to bear upon social and civil affairs, so the condition of woman was improved, and her rights to protection and redress were acknowledged. With respect to marriage and divorce, the rule of the Roman Catholic church applies to both sexes equally; while all Protestant legislatures (except our own), in declaring that marriage may be dissolved for the cause of adultery, have accorded to the wife the same rights and remedies as to the husband.

“10. Because by our ecclesiastical law (the only law at present applicable to this subject) the same judgment is pronounced in the case of adultery, whether the crime be committed by the husband or the wife; and there appears to us no reason why, in extending the remedy, the principle should be changed.

“11. Because as to the objection that the extension of the law to cases of adultery by the husband, will give occasion to a great number of suits for divorce, we think apprehension is altogether groundless. The proceedings can originate only with the wife, and she has, both as to feeling and interest, so much at stake, so much to relinquish which must be most dear to her, that we think there is little fear of her resorting to this remedy except in extreme cases, and after all hope of amendment has ceased.

“12. Because by the law of Scotland the adultery of the husband, with respect to divorce, is placed on the same footing with the adultery of the wife. This law is found to be attended with no inconvenience. The evidence upon the subject is above all exception, and we deem it most desirable that laws which so deeply affect the social and moral condition of the people should, in con-

tiguous parts of the same empire, be in accordance with each other."

There is yet another protest of the same noble lord, of the date of the 23rd of June, 1857, which is also worthy of being recorded on our pages for the like reasons which we have offered for extracting the former. The occasion for the second protest was his moving the introduction of a clause, giving to the wife a divorce when her husband had been "guilty of wilful desertion, without probable cause, for five years or upwards." This proposition seems to us, we confess, so rational, and essentially just in its intention, that we can only attribute its rejection to what a learned living divine calls "invincible ignorance," and hard-cased prejudice. This second protest is as follows:—

"1. Because the contract of marriage is the most solemn engagement into which a man can enter, and in which he promises to love, comfort, and honour the woman, and keep her under all circumstances of sickness or of health, and adhere to her as long as they shall both live.

"2. Because the purposes of this engagement, as deduced from Scripture, are of the deepest interest and importance, viz., for the birth of children, to be brought up in the love and fear of God, for a remedy against sin, and for mutual society, help, and comfort, both in prosperity and adversity.

"3. Because by wilful desertion not only is this sacred promise impiously violated, but all the purposes for which this ordinance of God was instituted are wholly frustrated. Even in the most ordinary contract the breach of it on the one side puts an end to the obligation on the other, and we see no reason why a different rule should be applied to the contract of marriage, and more especially in a case destructive of the entire objects of the union. It appears to us to be contrary to all principle, and most unjust, that the husband should be permitted to set at nought an engagement followed, as it must be, by such consequences, and that the woman should continue to be bound by it.

"4. Because we feel strongly the extreme cruelty of such conduct towards the deserted wife, in the utter disappointment of all her confident expectations of happiness from the promised love, com-

fort, and society of her husband, and leaving her without hope to the contemplation of a long, dreary, and desolate future.

"5. Because divorce from this cause is justified as scriptural by the highest ecclesiastical authorities. It is well known that at the Reformation the subject was anxiously and carefully considered by prelates and divines eminent for learning and piety, and that they came to the conclusion that wilful desertion was a scriptural ground for divorce. We find the names of Archbishop Cranmer, of the Bishops of London, of Winchester, Ely, Exeter, and others, of Latimer, Parker, &c., of Peter Martyr, Martin Bucer, Beza, Luther, Melancthon, Calvin, &c., among those who maintained this opinion, and which was adopted by the whole body of Protestants on the continent of Europe. Accordingly, this has been the acknowledged doctrine of all their churches to the present day. We find the same doctrine expressly stated and adopted in the eighth article on divorce in the *Reformatio Legum Ecclesiasticarum*, compiled under the authority of Henry the Eighth and Edward the Sixth, which body of laws, although it did not receive the confirmation of the crown, in consequence of the early and unexpected death of King Edward, has always, as the commissioners on the law of divorce in their report justly observe, been considered of great authority. We also find that at a more recent period a right reverend prelate, eminent for learning and talents (Cozens, Bishop of Durham), in his celebrated argument delivered in this House in the case of Lord Roos, maintained the same opinion. His words are these:—'The promise of constancy in the marriage ceremony,' does not extend to tolerating adultery or malicious 'desertion, which dissolve the marriage.'

"6. Because by the law of Scotland wilful desertion, as in all the Protestant churches on the continent, is considered to be a scriptural ground for divorce; and the law in this respect is regarded, by all the first authorities in that country, not only to be free from inconvenience, but as just and highly beneficial. We further deem it to be most desirable, that upon such a subject as marriage and divorce, affecting as it does the whole social system, the same law should, as far as practicable, prevail in both parts of the kingdom, and the more so as continued experience has shown

the great inconvenience occasioned by the difference and anomalies of the two systems.

“7. Because, as to the objections to the proposed extension of this measure on the ground of its tendency to demoralize society, this is not only disproved by the example of Scotland ; but a careful examination of the state of society in Roman Catholic countries will, we think, lead to the conclusion, that the principle of the indissolubility of marriage is far less favourable to morality than the opposite doctrine, accompanied with a cautious exercise of the power of divorce in such extreme cases as those of adultery and malicious desertion.

“8. Because, as to what is urged with reference to the law of our ecclesiastical courts, we answer that the *object of the present bill throughout is to amend that law, and to render it more consistent with reason and justice* ; and with respect to the Church of England, we will merely repeat what we find stated in the argument of the learned prelate to which we have already referred, viz., that ‘ we cannot see why they are to be styled the Church of England, who join with the Council of Trent rather than those who join with all the reformed-churches, and plead against the canon of the Church of Rome, which hath laid an anathema upon us if we do not agree with them.’ ”

These protests are, we say, valuable records ; and although it is mortifying to perceive that the grounds so forcibly stated therein were inadequate to affect the reason of the majority of the representatives of hereditary wisdom, yet it is consolatory to think that they may hereafter be referred to and acted on, because of their intrinsic merits.

As we have at the outset referred to the multiplication of legal volumes on all occasions, we feel that it is but doing justice to the authors of the works enumerated at the commencement of this article to say, that, so far as we have been able to examine and compare them, they are as complete as could be expected at the present stage of the operation of the new court.¹ Indeed, those relating to the Divorce Act would be of little use to the

¹ Several editions of the two Acts noticed in this review were hastily issued from the press, without the Rules and Orders ; and were, of course, useless.

practical lawyer, if they had not a somewhat wider scope than that of being mere editions of the new Act: for, by the 22nd section it is enacted, that "In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed, and act, and give relief, on principles and rules which, in the opinion of the said court, shall be, as nearly as may be, conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief; but subject to the provisions herein contained, and to the rules and orders under this act." Mr. MacQueen, therefore, has in his book discussed the law of marriage; and has included that belonging to Scotland as well as England, because either may be the subject of the jurisdiction of the new tribunal; and he sets forth not only the law of the ecclesiastical courts so far as it is applicable to the present practice, but also much collateral and historical matter. Mr. Brandt, the other learned author whose works on the subject we have examined, has, in his well-arranged and convenient volume, taken a narrower range, and confined himself more to the practical parts of the subject; and it is on considering these points especially that we are led to lament over the shortcomings of the law as it now is, and to hope that it may so grow, by judicious fostering and skilful administration, as to take its place, ere long, as one of the most complete reforms of this our generation.

We must now briefly turn to the other important statute of the same session which we have to notice; we mean "The Act to amend the Law relating to Probates and Letters of Administration in England" (20 and 21 Vict., c. 77), which contains 119 clauses.

We have from time to time, on previous occasions, discussed various matters connected with this branch of the ecclesiastical courts;¹ and it would be of no practical value to debate now the necessity or the policy of the change effected, or to tell how the battles of proctors and doctors were fought and lost and won. It must suffice to say, that it has now been eventually declared by statute, that it is "expedient that all jurisdiction in relation to the grant and revocation of probates of wills, and letters of

¹ As to Common Form Practice, *vide Law Magazine*, vol. liii., p. 1; vol. liv., p. 110; and *Law Magazine and Law Review*, vol. i., p. 252.

administration, should be exercised in the name of her Majesty by one court." So that now, the great obstacles to all reform being removed, we may expect to see accomplished any rational improvement or development in the system which time and experience may suggest. Miracles are not wrought in these days in aid of the Legislature; and it would have been one, if, in spite of all the conflicting interest and opposing opinions, the statute had come forth perfect in all its parts.¹

Mr. Coote has confined his attention to the Common Term Practice of the Court of Probate. His experience under the ancient jurisdiction gives him great advantage in its exposition; for the reader will recollect that, except where it has been otherwise provided by the new statute or the orders, the practice of the court is decided to be in accordance with the ancient practice in the Prerogative Court—meaning, we presume, that of Canterbury. The author, therefore, has prepared an excellent practical manual for the use of the general practitioner; for now that the select few no longer celebrate exclusively their mysteries in Doctors' Commons, no reason can exist why all should not have the opportunity of penetrating them. Mr. Weatherby, likewise—another of the practitioners under the old system—seeing that the new court is an open one, has frankly offered, in his "Practical Guide," to all who will avail themselves thereof, the fruits of his former experience.

We have called the court in question an open one; but, so far as it affects counsel, this turns out not to be so. "Advocates of the ecclesiastical courts," says Mr. Goodwin, in his useful manual (p. 11), "who have been admitted at the time of the passing of the act (25th August, 1857), may practise as advocates or counsel *in all matters and causes whatsoever* in the Court of Probate. Serjeants and barristers-at-law may practise as advocates or counsel in *contentious* matters (sec. 40); and, it would seem, in no others. The act at the same time throws the Courts of Law and Equity open to advocates, without any restriction. The act makes no provision for the transaction of

¹ Whilst we are writing, we are informed that a bill to amend the act of last session is about to be introduced into the Upper House by Lord Cranworth, the main subject of the amendment being that relating to Appeal.

non-contentious business in open court, when the present race of advocates has died out."

It is possibly a debateable point, notwithstanding the words of the above section, whether counsel are necessarily excluded from non-contentious business. However this may be, it is quite clear to us that there ought to have been no room left for any question of the kind to be raised. It is a blot in the statute, which was introduced on very obvious and not very creditable grounds; and by a process it is said, which in parliamentary phrase is, we believe, termed "smuggling." We hope that provision will be made to rectify the error before that painful event shall occur to which Mr. Goodwin has so heartlessly and curtly referred—namely, the dying out of the present race of advocates. The whole spirit of our law is against restrictions of the kind. To the proctors were conceded compensations which they have certainly calculated at an enormous sum.¹ The same principle ought to have been adopted in the case of the advocates, if justice so required it. If it be true that they have cunningly obtained an undue preference and exclusive audience in the greater portion of the business of the court, we hope the advantage so acquired will be both openly and quickly taken away.

It would be unpardonable to conclude any remarks on the subject of the statutes to which we have been referring, without acknowledging the deep debt of gratitude which the country owes to Sir Richard Bethell as a law-reformer and legislator. To profound acquaintance with the principles of law, vast experience, and unequalled skill as a practitioner, he adds a scientific knowledge of his profession—which is, alas! a rare thing to meet with, in or out of parliament; he knows, therefore, not only what the law is, but what it ought to be. Single-handed, almost, he effected during his term of office, in the face of multiplied and wearing hostilities, some of the most important and genuine reforms, in which he exhibited powers sufficient to make the reputation of half-a-dozen other attorney-generals. That he should not have accomplished more, they who know the difficulties which surrounded him have, indeed, no cause for wonder-

¹ A commission, consisting of the Judge-Advocate, Sir Stafford Northcote, and Mr. Follett, has been appointed to investigate the claims set up.

ing. Assuredly it is not to Sir Richard Bethell that the shortcomings and defects in the acts of parliament we have been discussing are to be attributed.

ART. X.—PAPERS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

I. PAPER ON THE STOCKJOBGING ACTS, BY MR. SERJEANT WOOLRYCH.¹

I AM to address you this evening upon the propriety of repealing the Stockjobbing Acts. Indeed I might say, that if Sir John Barnard's act, 7 Geo. II., c. 8, were expunged from the Statute Book, the object of this paper will be attained, because I believe that, with the exception of that act, there are not any material provisions upon the subject. It will appear that the system of jobbery which has had so long and powerful a sway, prevailed chiefly in East India stock, it is said, as early as 1695. It is related of one Sir Basil Firebrass, whom the Company desired to make their friend, in order that their charter might be secured, that he contracted to PUT, as the phrase is; or (in other words), to oblige them to receive of him £60,000 India stock at £150. The stock was then worth £100 only per cent. For this difference the consideration was the service he should render to the Company, and he actually received from the Company £30,000. The mania of speculation, however, was by no means limited to the East India House. The government securities were raised or depressed in price according to the fancies of a multitude of greedy speculators. They first crowded to offer their money to the state at exorbitant interest, and then wild with the new toy, the national debt, they embarrassed the ministers of the time with their endless puts, and refusals, or options, as the cant terms are, because it became difficult to ascertain the *bonâ fide* value of the securities. Thence sprang the act of 1697, which required every contractor's bank

¹ Read before the Society on Monday, January 18, 1858.

stock to be registered in the bank-book within seven days, and also that the stock should be transferred within fourteen days after the making of the contract. For a moment this law produced a salutary effect, but it was soon neglected, and, being only renewed for seven years after its temporary expiry at the end of three, the flame soon burst out again; and the public delusion scarcely received a check until the fatal bubble of 1720 woke up the most infatuated, and turned the stream once more in favour of restrictions. The enraged sufferers, unable to see, in the exasperation which seized them, that they had been themselves the promoters of gaming, fell with every show of virtue upon the jobbers and brokers whom they had themselves been employing and encouraging; and the vigour of the cry which was thus raised, and which pronounced its will in parliamentary resolutions and violent pamphlets, was in effect parent of the act which was now fast approaching, and with which we have to deal this evening. Yet, notwithstanding this clamour, the general opinion, and more especially the judicial opinion, does not appear to have been entirely established. Many persons thought that, *as commerce was free, and dealings in other commodities than stock were open to all*, it was hard to place that species of property under so close a restriction.

Lord Holt observed in a case of *Mitchell v. Broughton*,¹ that the act of William III. must be taken strictly, because it destroys *Bargains*. And Lord Eldon has deemed the act of Geo. II., although in form remedial, yet really penal, and entitled to a rigid construction. And so far from the payment of differences being viewed in the obnoxious sense attributed to it by Sir J. Barnard's act, Lord Ch. Parker, upon appeal, seemed to regard that mode of settling the account as the most fair and equitable.² There was a bill for a specific performance of an agreement to transfer stock; Cudden was the plaintiff, Rutter the defendant. The case was, that the defendant agreed with the plaintiff to transfer to him £1000 stock upon the 20th November. He gave a promissory note to and received from the plaintiff two guineas earnest. The defendant had inserted, "or pay the difference" (the usual words), but the plaintiff struck them out, and then the defendant

¹ Lord Raym., 673.

² 5 Vin. Ab., 538, 540.

signed the note. The stock, which was South Sea, rose considerably, and the defendant did not deliver the £1000 stock on the day, but he offered in a few days afterwards *to pay the difference*. Hence the difficulty. The plaintiff insisted upon the stock, the defendant upon the mere liquidation of the debt by paying the difference. The defendant's counsel allowed that this transaction was in the nature of a wager upon the rise and fall of stock, and insisted that the payment of the difference was a sufficient performance of the contract, and that a remedy at law was open for that purpose, and would meet the justice of the case. Sir Joseph Jekyll, however, decreed a specific performance, with costs, and rested upon the plaintiff having struck out the words, "or pay the difference." The defendant appealed. The Chancellor likened the case to a bargain for the sale of corn. Here, upon default of delivery of the corn, equity will not decree performance, but the difference of the price agreed on by the parties, and the price on the market-day, would be the measure of damages at law. On the other hand, the plaintiff's counsel assimilated the case to the purchase of bales of silk, or (which was more to the purpose) to the sale of land. But Parker, C., said, it made no difference to the plaintiff if he received the balance of value. Some lands might be more valuable than others, or, at least, more convenient to the purchaser; but one sum of £1000 stock was the same as any other which the plaintiff might have bought of any other person upon the very day. These sorts of contracts are understood to mean no more than to transfer the stock or pay the difference, and this fully answers the intention of the parties. Besides, the defendant had not the stock when the contract was made, and the Court will not decree specific performance where the party has not the thing to deliver. Had not the defendant shuffled by delaying two months after the day, the bill would have been dismissed. As it was, he was ordered to pay the difference without costs, and Sir J. Jekyll's decree was reversed. Now, this is exactly the argument used at the present day. It is affirmed, that the custom of paying differences is universal; that the Committee of the Stock Exchange would interfere if these payments were not satisfied, and that sufficient compensation is made by indemni-

fyng the maker of the bargain from any loss he may sustain by his purchase or sale.

Sir John Barnard was the son of a Quaker at Reading, a town where that society has flourished almost from the time of their institution in England. Although he saw reason to become an adult member of the Established Church, he was, nevertheless, a religious and thoughtful man. He seems to have had his attention called to this subject of financial speculation by a bill which prohibited any subject of Great Britain from advancing money, by way of loan, to foreign princes or states. This was in 1730, when the Emperor Charles VI. wanted to borrow £400,000 in London. He opposed this measure, and helped to occasion its being considerably modified. He seems to have taken an active part in monetary affairs, and particularly with regard to the national debt, and in 1734 the act, which bears his name, received the Royal assent. In vain was it said that the public creditor was entitled to dispose of his funded values as freely, and with as little control, as any other species of property: in vain was it argued that a sale of stock for time, and the giving of money for the *put* of stock, was nothing else than a way of insuring the stake which a man had in the public funds. The bill, which failed the year before in the House of Lords, and only passed the House of Commons by a majority of six, was now successful; and, although much has since been done to mitigate the construction of its severe clauses, it remains untouched, whilst the law of usury has been swept away from the code of monetary affairs. This act of twelve sections was to endure for three years only, but at the end of that period it was made perpetual. It was an act, as its title put forth, "To prevent the infamous practice of Stock-jobbing." First of all,¹ puts, refusals, and wagers, concerning stock, were declared void, and persons sued were liable to answer upon oath, in equity, any bill preferred against them on that behalf.² The penalty was fixed at £500, with certain exceptions highly favourable to a class of persons known by the name of informers.³ Then came a clause⁴ aiming at differences, with a penalty of £100 for giving or receiving such dif-

¹ Sect. 1.² Sect. 2.³ Sect. 4.⁴ Sect. 5.

ferences in money. On the contrary, if stock was sold to be delivered for a certain day, and the buyer failed in his contract, it might be *sold* to another person, and the damage sustained might be recovered from the defaulter.¹ So in the case of stock bought and not transferred.² A more stringent section follows. If a person sells stock of which he is not possessed at the time of the contract, the agreement becomes void, and the seller becomes liable to a forfeiture of £500.³ The seller, not the buyer, incurs the penalty, for the statute was extended to recent fictitious SALES of stock. The broker engaged in the transaction is to be mulcted in the sum of £100. Then comes the provision concerning the keeping of a Broker's Book, under a penalty of £50.⁴ It then struck those who had charge of the measure that it might be as well to save *loans* of stock; for, although not within the words of the act, the practice was common, as now, to advance the stock on payment of interest, or to lend money upon stock, both which transactions were declared to be lawful, notwithstanding the provisions which we have enumerated.⁵

These are the chief ordinances of a very remarkable effort of the legislature, remarkable as it respects the slowness with which it obtained its position in our books, and the tenacity with which it has adhered, although it would be difficult to point out which of its two evils predominates at the present day, its mischief or its inutility. Now the penalties prescribed by the act, it must be confessed, are severe; but probably that circumstance would not have hindered informers from persecuting their victims, were it not that there is great difficulty in proving such a case, and that the judicial bench, as a body, have not been very friendly to the statute. Indeed it has been boldly, and perhaps too strongly asserted, that one case only of a *qui tam* action has occurred, and that as recently as 1849. This was *Cooper v. Bloxham*, tried before Lord Denman at the London sittings. The plaintiff was a clergyman, and the defendant a jobber or a broker. The bargain was proved, and it was shown that the defendant must have known that the vendor of certain stock was not possessed of it at the time when the contract was to be executed. Lord Denman directed a verdict for the plaintiff upon this evidence. It

¹ Sect. 6.² Sect. 7.³ Sect. 8.⁴ Sect. 9.⁵ Sect. 10.

was subsequently attempted to shake this verdict upon a point of pleading, because the declaration had failed to allege the defendant's knowledge at the time of the negotiation. The plaintiff, however, died, and I believe no judgment was given. The Lord Chief Justice certainly stated that this was the only case which had come before him. The penalty sued for was £100. I am given to understand, nevertheless, that this is not the solitary instance of such a proceeding, but that no verdict will be found recorded for the plaintiff in any other.¹ It will be recollected, that many years since a clergyman was very harassing to his brethren, in suing for penalties in respect of non-residence. A very slight encouragement might set up another of these mischievous reformers to scatter the citizens of the Stock Exchange.

With regard to the bill of discovery, the courts have turned the tables against the framers of the statute. For, instead of lending the aid mentioned by the act to unravel the transactions prohibited, they have constantly countenanced the excuse of the broker, when he has said, that to answer the bill he must make allegations which would criminate himself, and so render him liable to penalties.² Whereas in one of the latest cases, the broker was ordered to answer interrogatories concerning certain shares, because no penalty attached.³ It is not my intention to trouble you with all the law which has arisen out of this act of parliament, to go into the cases where securities have been held void or valid, according as they approached the dangerous shoal of gambling differences.⁴ It may be sufficient to state that the act has been amply relied on; and, although not successful in penalties, has wrecked many a demand which, had it been made in

¹ In 1838, Mr. Baron Alderson said at Gloucester, when trying an action under the Bribery Act, "That the penalties were too severe; that there had been many actions for penalties under Sir John Barnard's act, but it is triumphantly said there had been no conviction."

² 20 L. J. Ch., 289, *Short v. Mercier*. See *Bullock v. Richardson*, 11 Ves. Jun., 873. 1 Madd., 230, *Billing v. Flight*, that no bill of discovery lies under sections 5 and 8.

³ 23 L. J. Ch., 8vo, *Trye v. Williams*.

⁴ As in cases where a bill, void under 7 Geo. II., c. 8, becomes available in the hands of a *bona fide* holder without notice. See 6 Bing., 109, *Day v. Stewart, &c.*

a hundred other equally hazardous transactions, could not have been resisted by courts of justice. Take, for instance, the case of a merchant who has lost £10,000 in the cotton, corn, or hop markets, and £10,000 in consols by stockjobbing. He is called upon to pay these differences. Now, say he has only £15,000 to pay his debt of £20,000, and is therefore a defaulter to the amount of £5000. He is willing to pay all his creditors rateably. £7500 would belong to one set, and the like amount to the second set of these creditors. But whatever he might himself have done of his own motion, his assignees in bankruptcy are very differently situated. "We cannot pay you one shilling of your £10,000," they say to the consols creditors—"the transactions are against Sir John Barnard's act." But they reply, "The speculators in corn and cotton are quite as blameable as we may be, yet you will pay them." And a true speech it is. These men leave the office with fifteen shillings in the pound, whilst the others lose every thing.¹ The same might be said of transactions in foreign funds, in omnium, in shares,² none of which are touched by the 7 Geo. II., c. 8. The maxim *in pari delicto, potior est conditio defendentis*, can hardly be said to apply here. Whatever censures belong to either of the parties, yet where one carries off the spoil and the other remains unpaid, although morally speaking no worse, to use the poet's phrase—

"A just comparison still is
Of things *ejusdem generis*."

There was a case of Whitmore against Radcliffe, tried before Chief Baron Pollock, in June, 1846, which places this act of the great London citizen in a rather invidious point of view. It will be found in Keyser, "Law Relating to Transactions on the Stock Exchange," p. 210. The plaintiffs were Messrs. Whitmore, stockbrokers. The defendant was a clergyman. The action was brought to recover £1420; a small part for commission, and the residue for a sum paid for differences upon the sale of £40,000 consols, made for the defendant by the plaintiffs.

¹ See 5 M. & Wels., 462, *Hibblewhite v. M'Morine*. The law seems still the same notwithstanding the 8 and 9 Vict., c. 109, unless the transaction be a mere bet upon the price of goods. See 11 C. B., 542, *per Cresswell, J.*

² 4 Man. & Gr., 355, *Hewitt v. Price*.

These stockbrokers had no doubt been engaged in such transactions before; they had, in fact, been educated in them. A large portion of men, looked upon as of high respectability, gain an important addition to their livelihood by means like these; they might, therefore, have been surprised at finding that Sir John Barnard's act was placed upon the record; and still more so, when the judge, apparently against his will, directed the jury to find for the defendant. The words of the Chief Baron in summing up are given at length by Mr. Keyser; and I should not do the subject justice if I did not retail them to you:—

“Whether the stockjobbing act is an act that would be passed in modern times, or whether it ought to be repealed, we have nothing to do with at all. We must administer the law as we find it. And I think neither I, by any gloss given for the purpose of getting rid of a penal statute, nor yet in respect of the facts—¹I must deal with the law, and you must deal with the facts conscientiously. If this is an act that ought not to remain on the statute-book, it should be removed. I am not here to deliver any opinion upon a general question, I think. I am frequently called upon to animadvert upon particular conduct that is before me. If a person in the witness-box perjures himself, if a plaintiff or defendant appears to have been guilty of fraud, I think, when that comes before you, I have to comment upon it in the language that belongs to me, and with the sentiments it may fairly excite in me. I do not think I am called upon, and I think I should be travelling quite out of my duty, if I were to make any comment upon questions of general policy. I must administer the law as I find it. I take therefore this statute; there it is: it is the law of the land, and we must act accordingly.” The defendant had his verdict. If the learned Lord Chief Baron had been passing judgment of death upon the act, he could not have aggravated its condemnation by stronger speech.

Another instance may be cited of the readiness with which the judges will arrest any overt act of dishonesty. There was an action for money paid. The defence was that it was paid for differences by the brokers on account of unlawful contracts, by way of gaming and wagering, relating to the public funds, and

¹ *Sic.*

to railways, and shares in railways, and to the then present and future prices thereof respectively, instead of immediate transfer, partly contrary to the 7 Geo. II., c. 28, and 8 and 9 Vict., c. 109. The judges said that the plea did not answer the complaint as to money paid for losses on shares, and so that it was bad altogether; and that the 75th sec. of the Common Law Procedure Act did not help it as to Consols.¹

So firmly did fraudulent men rely upon the working of the act, that the Courts were compelled to use "eagle eyes," as Lord Kenyon expressed himself, to prevent an undue use of the powerful and ruinous provisions of this act which were occasionally presented to their notice. The incident which gave rise to this emotion was this:—A stockbroker, named Kentish, applied to a clergyman to lend him £3000 stock. He undertook to replace this stock on a given day. The stock was sold, and the proceeds were taken by the broker; but when the day of transfer arrived this person refused to pay, declaring that the contract was void under the 7 Geo. II., c. 8, he having no stock in his possession to redeliver. It was seriously argued that this was one of the mischiefs which Sir John Barnard's act was meant to remedy, but Lord Kenyon said it was impossible not to feel great indignation at the conduct of Kentish. The title of the act was to prevent the infamous practice of stockjobbing; but, if the defendant's objection were to prevail, it ought to be altered, and it should run thus—"An Act to encourage the wickedness of Stockjobbers, and to give them the exclusive privilege of cheating the rest of mankind!" The Chief-Justice said that the case fell within the exception in the last section (section 11), and judgment was given for the clergyman.² The defendant's excuse in this case was the more shameful because the plaintiff was not to reap any advantage from his kindness. I am now about to trouble you with a case, a very modern one, which places the statute in an entirely new point of view—a case which, if well considered, would seem to have made the act do justice against its will. There was a man named Lodge, a

¹ *Lyne v. Siesfield*, 1 H. & N., 278. The distributive construction of pleas of payment and set-off.

² 8 T. R., 162, *Sanders v. Kentish*.

member of the Stock Exchange. He was a broker, and likewise a jobber or dealer in the funds. He had extensive transactions for the account-days, and at length the differences were so much against him in the "house," as it is called, and his debts out of doors were so considerable, that he was obliged to declare himself unable to meet his engagements. Now the course of the account was that Lodge was entitled to £11,440 ; but he had to pay £21,886, and he seemed to have incurred debts amounting to £18,000 in addition. The above sum of £11,440, together with a small amount of £504 due upon another settling day to Lodge, was disposed of according to the rules and usages of 'Change, to which he had given in his adhesion upon his enrolment as a member. Accordingly, certain dividends of so much in the pound were paid by a Mr. Gooch, the official assignee of the Stock Exchange, to the creditors within doors rateably. There remained, after these payments, a sum of £138 in the hands of the assignee, and this, according to the Stock Exchange rule, went to the treasurer of the fund for decayed members, until funds should arise to warrant the payment of a further dividend.

However, Lodge, after this, was declared a bankrupt, and the assignees brought an action against Mr. Gooch, the assignee of the Stock Exchange, for money had and received for their use as assignees. The defendant was not aware of any act of bankruptcy until long after he had paid over the money. On the contrary, before Lodge's announcement of default, he was considered to be a man of wealth. The jury found that the greater part of the transactions entered into by Lodge were of a speculative character, with a view to settle differences, but that one transaction in particular was *bona fide*; but the jury would not undertake to say that at the time of the contracts it was understood that ONLY differences were to be paid or received. Notwithstanding, the Court, to whom the whole matter was referred, gave judgment for the defendant. They had no doubt as to the great bulk of the payment. Whatever title the assignees might have to these monies as against the creditors, the defendant, the mere conduit through which they passed, could not be answerable, and there was no act of bankruptcy which related

back to the time of payment. But there was another small payment, that of £138, which it became necessary to deal with more carefully. This was claimed likewise as part of the personal estate of the bankrupt which vested in the assignees. The contracts, however, from which the money was derived, were void in their inception. They were mere wagers on the price of stock, and in contravention of Sir John Barnard's act.¹ The parties were respectively liable to the penalty of £100. Money voluntarily paid on an illegal consideration for the benefit of others, cannot be recovered.

Then the case of *Tenant v. Elliott* was quoted.² Elliott was a broker, and he effected an illegal insurance for Tenant. The ship was lost, and the underwriters paid Elliott the money, upon which he refused to pay it to the plaintiff without any intimation from the underwriters to keep it back; intimating that he was in the nature of a stakeholder. Buller, J., said:—Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. The words of Lord Campbell, in concluding his judgment, are very remarkable. They press upon both horns of the dilemma:—"We were very impressively called upon by Mr. Wilde (the plaintiff's counsel), to come to a decision which would defeat the attempt of the members of the Stock Exchange to set up a code for regulating transactions there at variance with the general law of the land, for the equal distribution of the property of a bankrupt among all his creditors. Unfortunately, the only mode which he pointed out for effecting this object was for us to repeal Sir John Barnard's act, or, in other words, to treat it as a nullity. But we are bound to give effect to this statute, and therefore, as to the whole of the sum sought to be recovered, to pronounce judgment for the defendant."³ In this important case there appear to be two points

¹ It is worthy of remark that the 8th and 9th Vict., c. 130, was not mentioned in the case.

² 1 Bos. and Pul., 3.

³ 25 L. J. Q. B., 137. *Nicholson and Others, assignees of Lodge, a bankrupt, v. Goodh.*

worthy of attention. First, that with this judgment in front of them, the assignees would not venture upon attacking the individual members who had actually got the money, not merely from the difficulty of proving the receipts, but because these contracts likewise would have turned out faulty and illegal in their inception, and hence nothing could have been received upon them. The next consideration is, that the innocent parties, the general out-door creditors, the butcher or baker (it might have been), were deprived of their rateable distribution of the general estate; whereas the very men whom Sir John Barnard would have visited with his artillery of penalties obtained 10s. 6d. in the pound, with, at one time, a hope of getting more. Sir John Barnard, by arresting these contracts *in principio*, prevented Lodge from making any legal title in them, so as to pass it to the assignees. Lodge could not have recovered a shilling from the persons with whom he had speculated; but setting aside his bankruptcy, and admitting he could have satisfied his creditors, Lodge could have recovered the money from Mr. Gooch, upon the principle laid down in *Tenant v. Elliott*. The money, then, which was bred, if I may so speak, illegitimately, was devoted to an illegitimate purpose, and had not the Act of Geo. II. been in force, it is not impossible but that the speculators might have been entitled—not to 10s. 6d.—but to five shillings (it may be less) in the pound. I think I have now pointed out some great inconveniences arising from the retention of an act in our code which, for all useful ends, seems obsolete, and for mischievous proceedings quite operative and in vigour.

If, nevertheless, this paper were to aim at the mere repeal of the act against stockjobbing, and thus virtually to license that practice, or, more properly speaking, to leave it to the operation, adverse or otherwise, as it might be, of the common law, I should much hesitate to appear here as the advocate of a change. Whatever may have been the inconveniences of the statutes on the subject, great as the moral frauds have turned out on the part of defendants sued for their differences, rare as penal suits have been, obsolete or neglected as are many portions of this peculiar code, there might still be a difficulty in asking a society like this to assent to a course which might be construed into an encour-

agement of speculation. On the other hand, should it be proved to your satisfaction, that the law has inflicted, and may probably occasion, considerable private wrong, so that you will come to observe the combination of inconvenience with injury, I shall then submit that I have made out the substance of these allegations, and that a committee may be asked for to examine and report upon the proper conclusion to be drawn from them.

It would perhaps be a fair matter for suggestion, that if an act of parliament be so much neglected as to remain as a bait for informers, or a refuge for the dishonest man, it should, on these grounds alone, be viewed with no ordinary degree of jealousy; but when the courts of justice in England are found zealously ready to restrict its provisions within the narrowest circle, and if many modern judges are obviously disposed to discourage fraud between man and man (for you must be aware that the best opinion is adverse to the notion of stockjobbing, being a misdemeanour at *common law*), there are just grounds for entertaining without fear a proposal for its extinguishment. Mortimer, was a stockjobber. He was applied to by a stockbroker to transfer to one C. £5000 stock. But he had no stock of his own, and therefore, according to custom, he went to a person who had as much stock, and this person transferred the stock standing in his name to C., afterwards the defendant. It seems that there had been some dealings between this broker and C., so that C. expected to get the stock on account of a debt or balance due to him from the broker. Being foiled in this by an action brought against him at the suit of the transferrer of the stock, he set up the statute. Now, whatever way the decision might turn, it is submitted to you, that the act in question is capable of being used as a very mischievous engine. This was not a fictitious sale of stock. The sale and transfer were *bonâ fide*. Every broker is not possessed of £5000 or £10,000 stock. It is, therefore, a matter of public convenience that an agent should be in a position to borrow, as it were, the necessary amount of funds required by his principal. Some doubts, however, were thrown out in the judgment of the Court, and the defendant carried his cause into the Exchequer Chamber. There, however, he sustained a signal discomfiture; for Lord Denman, supporting the judgment of Lord Abinger and the Court of Exchequer, distinguished between

a contract to sell or to transfer, and a contract followed by an actual sale or actual transfer. Such a transaction, if illegal in its inception, had ceased to be so. "A promise to pay on consideration of a transfer actually made, is neither prohibited by the words, nor is it, as we think," said the Chief Justice, "with- in the intent of the statute."¹

Let me observe that a penalty of £500 attaches where the person contracts or agrees to sell or transfer stock of which he is not at the time in the actual possession. A firm on the continent directed their agent in London to sell stock when it should rise to a certain price. That event having occurred, the stock was sold, and the transfer ticket was given in at the bank. The purchaser, however, discovering that the advance in price was owing to a forged letter announcing the termination of our differences with France, refused to complete his bargain. Upon this the firm abroad instructed their agent to resell the stock, which was done at a far less price; but it turned out that the stocks were shut, and that the transfer, upon the resale, could not be made until the following month. In the mean time, an action had been commenced by this firm against the defaulter upon the original contract to recover the difference. Now, the memorandum of the Nisi Prius Record was June 25, and the transfer was completed on the 6th July, consequently it did not take place until after action brought. The defendant had the benefit of this mischance; for Lord Ellenborough nonsuited the plaintiffs, and although their counsel strove to refer the transaction to the time of the sale and not to the subsequent transfer, the Court upheld the ruling of their chief; and so, because the transfer books happened to be closed at the time of the second sale, the defendant was enabled to escape from his contract, and to deprive the foreign firm of at least £130, besides the costs of the litigation. If the defendant, with his eyes open, was willing to give £70 for £1000 consols, he was scarcely warranted in taking shelter behind the stockjobbing act, to the injury of men who, for any thing that appeared to the contrary, were entirely ignorant of the political imposture.

¹ 6 M. & W., 58; 7 M. & W., 20; 9 M. & W., 636. See *Child v. Morley*, 8 T. R., 610., where the principal actually had the stock, and the broker paid the difference, but did not disclose the name of his principal.

Far from participating in the uncompromising condemnation which some of our judges have passed upon the settlement of stockjobbing differences, Lord Loughborough once expressed himself in this liberal manner: ¹—"Though I am clearly of opinion that the judgment of the Court of King's Bench upon the act is quite right, it goes no farther than that the Court will not execute these contracts; but where the parties have dealings together, upon a variety of transactions, and losses have been incurred and paid, and a general account is sought, I do not execute the contract against law, but I should do injustice if I did not give the advantage, if any advantage has arisen, or charge any loss which has happened. If it was a smuggling business, and they had been settling profit and loss upon a course of smuggling transactions, I should do great injustice if I did not bring that into the account. So, upon stock transactions, though the Court would not execute the contract, yet where the parties have been settling stock-dealings, and paying differences, I must bring those into the account."

A late decision of the Lord Chancellor of Ireland seems to place Sir John Barnard's act in an opposite although invidious point of view. A London firm was accustomed to transact large business in consols for a party in Ireland, who purchased in Dublin and sold in London, or *vice versa*. A separate register of stock was kept in Dublin for the convenience of Irish holders. These transactions, many of them not speculative, were entered into for settlement on the account day. Large sums of stock were on that day frequently transferred from London to Dublin by the firm, or were received from Dublin, as the balance of account might turn. In the midst of these operations, many of which, certainly the greater part, as I have said, were *bona fide*, *i. e.*, untainted by gambling, the Dublin party failed. The London firm upon this sought to prove against the Dublin estate. The assignees, however, resisted, and long litigation followed. Now, the Lord Chancellor suffered the firm to prove for their commission and for sums *bona fide* paid for stock, but rejected their claim on the contracts which are known by the name of "continuances." The brokers lost £1500 by the transaction.

¹ 3 Ves., 612, Watts v. Brooks.

I must not omit to place the case of *ex parte* Bulmer¹ before you, before I come to sum up the reasons for requesting your concurrence in these views for repeal. Thomas Pratt was a stockbroker. A Mr. Bulmer advances certain sums, to be employed within the Stock Exchange, for purposes which were illegal within this act. Pratt kept regular debtor and creditor accounts with Bulmer, but appropriated a large sum intended for these transactions, and belonging to Bulmer, entirely to his own use. He then became a bankrupt, and the balance of account being against him as much as £12,242 10s., he gave twelve promissory notes to Bulmer, and these Bulmer strove to put in proof under the Commission, whence the litigation arose. Now the commissioners at once rejected the claim, as being founded upon an unlawful consideration under the 7th Geo. II. And for some years before Lord Eldon decided this case, there can be very little doubt but that the judges of the day would have held the same doctrine, and A., who had lent B. money for an illegal transaction, would have lost every farthing of it, although B. had not employed any portion in the illegal transaction. But I should tell you that in the account itself there appeared items amounting to £255, which were avowedly for speculative gains, and this comparatively trifling mixture was the circumstance which induced the commissioners to form their unfavourable judgment. The Lord Chancellor (Lord Eldon) was determined to vindicate the country from so gross an injustice as to allow Pratt's assignees to take Bulmer's money for the benefit of third persons. The Lord Chancellor observed, that had Pratt remained solvent he must have been compelled at law to have refunded all the money which he had diverted from its proper channel to his own use. Justice required that the plaintiff should recover, unless the question should arise upon the very contract forbidden. The end of the principal case before Lord Eldon was, that although he would not suffer the promissory notes to be proved as being partially tainted with illegality, he would allow proof of all which was admitted by the bankrupt to have been the money put into his hands and diverted to his own use. *Faikney v. Reynons* was mentioned

¹ 13 Ves. Jun., iii. 13.

in this case as too sound to be shaken ; but Lord Tenterden seemed to throw a shade over this and similar decisions in *Cannan v. Bryce*.¹ I will now put a case by no means hyperbolic. Suppose that a sum of money is to be paid on a future day, for the completion of a purchase, for instance. The money is in the government annuities. The purchaser is not bound to trust his money to a banker, however respectable, and yet he has a right to command the price of the day if it be suitable to his views. He sells for the account. Something happens (it always does) to retard the completion of the contract. The account-day comes ; he must either transfer the stock, or leave his money in the funds. He prefers the latter, and if the balance of account is against him he must pay the difference. No one could ever think that he was dealing with *malum prohibitum* ; but he is under Sir John Barnard's act, and is liable to a forfeiture of £100. I now feel myself almost in a position to ask whether you will retain as part of your code a statute which, from its earliest operation, the judges (excepting, perhaps, Grose and Lord Kenyon), and even Lord Eldon, strove hard to mitigate—which later judges have indirectly assailed, as ill-suited to the age, and inconsistent with common justice and decency. You shall gamble as much as you may think fit in those dangerous pieces of paper, foreign stocks : you may engulf yourself in shares, and be made to pay the uttermost farthing of your differences :² you may take a security from another, both being cognizant of the illegality of the transaction on which it is founded, and may successfully sue upon it :³ you may prove a debt, the origin of which is very nearly allied to Stock Exchange speculations, having lent your money for that very purpose ; but although you have been brought up in the constant habit of paying and receiving differences on the recounter or account-day, and may have abided honourably by the rules of your order, yet in one unlucky moment you may meet with a man with whom you had had the most extensive dealings, and for whom you have paid a

¹ 3 B. & Ald., 179.

² Unless the transaction be within 8 and 9 Vic., c. 109. But *quære* of this.

³ At least according to *Falkney v. Reynolds*, which has not been over-ruled.

large sum, who may turn round and say : " It is true that I owe you £1500, but there is an act, called Sir John Barnard's act, of which I shall avail myself, although I am aware that other people around me are satisfying their engagements most punctually." Now we can take any interest, however enormous, from the distressed debtor. A bill-discounter is at least as much the subject of jealous observation as a Stock Exchange speculator, far more so than the ordinary jobbers and brokers who speculate for the account, and forfeit a large sum each month, if there were any one sufficiently dexterous to entrap them. And yet a bill-discounter is not rejected in society, although his powers of acquiring money at the expense of others is, since the repeal of the usury laws, measureless.

Some may think that we have got a remedy against the Put and Call system, under the games and wagers clause, 8 and 9 Vict., c. 109, s. 18. This, they may say, is in effect a wager on stock. And if a sale of stock, say for £10,000, be made for the account, and it turns out that the party selling is not possessed of so much, but that the whole transaction amounts to a time bargain, it might be alleged that this partakes of wagering, and may be, like the Put and Call, within the section. That clause makes all contracts and agreements, whether by parole or by writing, by way of gaming or wagering, null and void ; not illegal. Whatever contract, therefore, the jury should find to be a wager, and the Court should hold to be such, would fall within this statute. Upon an action brought to recover differences, supposing Sir John Barnard's act to be repealed, this question would arise ; and undoubtedly a mere naked wager would be within the 8 and 9 Vict., c. 109.¹ That act does not seem to embrace a claim by a stock or share-broker against his principal, who has instructed him to enter into fictitious contracts. The Courts lean against too strict an interpretation of this act of Victoria, as they do with regard to the 7 Geo. II., c. 8.² There is room for litigation to settle all these points satisfactorily. Yet, admitting that to be the rule, the ex-

¹ 11 C. B., 538, *Grizewood v. Blane*.

² 10 Ex. 572, *Oulds v. Harrison* ; Id. 614, *Jessop v. Lutwyche* ; 15 C. B. 562, *Knight v. Cambers* ; Id. 566, *Knight v. Fitch*.

change of the modern enactment for the stringent, precarious, and vexatious provisions of the act of Geo. II., can hardly fail to be a great gain.

There is one circumstance, perhaps, worth mentioning with reference to speculative values. If no business except that which is substantial and *bonâ fide* were to take place, it would seem that stock would be much dearer than it would be with the tide of speculation ebbing and flowing. If the government desire to borrow, they prefer a low condition of the funds; if the public seek to invest, the lower the figure the less they have to give. It is not quite clear to me whether the competition which goes forward does not prevent too high a demand for stock; and whether the occasional conflicts between the Bulls and Bears, as they are called, do not afford the buyer (and it may be sometimes the seller, in times of war or tumult) a better chance of a reasonable bargain than if there were no contracts for stock, independently of the bank books.

I am not speaking of the strictly moral, but of the political consequences of this long custom of illicit trading. Some may say that idleness is the parent of gambling. Now, card-playing is too universal to be destroyed by a stroke of the tongue or of the pen. Billiards are most frequently played for stakes; and any subscription or contribution or agreement to subscribe or contribute towards any plate, prize, or sum of money to be awarded to the winner of any lawful game, are expressly excepted out of the gaming act. You cannot recover for a card or billiard debt, but you may for a failure in paying the subscriptions just noticed; and if it be said that horse-racing produces fine cattle, and cricketing and yachting fine men, it may be answered that your saving of the plates and prizes is (if you will draw the line so tight) an exciting cause of betting and gambling on the Turf and at Lord's.

II. REPORT OF SPECIAL COMMITTEE ON PROFESSIONAL REMUNERATION.

THE special committee appointed by the council during last session, to consider whether any and what fixed rate of professional remuneration ought to be laid down, have to report as follows :—

The mode in which attorneys and solicitors are remunerated for their services has been long felt to be a grievance both by the profession and the public. Speaking generally, those services, often of a highly intellectual and responsible character, are estimated according to a mere mechanical standard, and that standard, except in a few cases, is applied with unrelaxing uniformity. The principle of remuneration for such services is exactly the same as if every artist, skilful or unskilful, were only entitled to be paid for his pictures according to the quantity of canvass and paint employed, and the number of strokes of his brush, and all of these charges were regulated by an inflexible tariff. In all the departments of legal practice, there are certain fixed scales applicable to the mere external forms in which the labour of attorneys and solicitors appears, but having no reference to the real amount of labour undergone, or to the extent of responsibility incurred. Where written documents form the results of their services, the services are paid for according to the length of such documents; and where formal proceedings are their results, they are paid for according to the number of such proceedings. No matter how great may have been the labour, skill, and experience necessary to bring matters into a certain external form, the external form alone ascertains the remuneration. No matter how important or valuable the services may have been which the client has received, he is protected by the one weight and the one measure against any charge founded on such substantial grounds. Even in cases where it is patent to common sense that the charges for the mere formal business will afford no compensation to an attorney and solicitor for the real

labour and real services of any employment he is requested to undertake, he is precluded from entering into any agreement with his client for receiving a higher rate of remuneration than the scale applicable will allow. So far, indeed, is the principle carried, of preventing an attorney and solicitor from in any way protecting himself, that he is not allowed to take security for costs to be incurred, however doubtful the means of the client may be, and however great the necessary disbursements.

The historical origin of such a system is somewhat obscure, although the principles from which it arose are abundantly obvious. Attorneys were at first strictly officers of the court; and, as such, it was in early times the practice for the court, or one of the judges, to tax their bills of costs. At what time this duty was transferred to the prothonotaries, or other officer of the court, does not very certainly appear; but, at all events, after the 2 Geo. II., c. 23, it was to these officers, under the superintendence of the court, that taxation was intrusted. The scales upon which they proceeded would seem to have been determined by the practice of the courts, with occasional directions from the judges. It appears, however, that in 1733 the prothonotaries agreed upon a scale of fees, which forms the groundwork of the scales now in force, and which has never been essentially modified, although some of the items have been changed to suit the alterations in practice. In one respect, indeed, we have even retrograded, as conveyancing business, unconnected with any proceeding in court, was for the first time subjected to taxation by the Attorneys' and Solicitors' Act of 1843.

The whole system thus derived is based on the principle of protecting the client against the attorney and solicitor, by compelling the latter to charge for his services according to the fixed scales, having reference only to certain items. The enactments of the Legislature, and the practice of the Courts, with regard to professional remuneration, seem to have proceeded on the idea, that to commit the client to the attorney and solicitor, without strictly tying up the hands of the latter, and prescribing in every particular the mode of charging for his services, would be *quasi agnum lupo committere ad devorandum*. The natural result, there-

fore, has been that, as legal practitioners must be remunerated for their services, they are driven, in cases where the scales do not afford proper recompense for the real and necessary work, to do work which is unnecessary, but which the scales allow them to charge for, and to charge at the highest rate which the scales will permit for work that is merely formal and mechanical. As Lord Brougham justly observed in his great speech on law reform, in 1828, "The necessary consequence of not suffering an attorney to be paid what he ought to receive for certain things is, that he is driven to do a number of needless things, which he knows are always allowed as a matter of course; and the expense is thus increased to the client far beyond the mere gain which the attorney derives from it." The propriety of attorneys and solicitors remunerating themselves in this way, has been frequently sanctioned by the courts. For instance, in *Davenport v. Stafford* (8 Beav. 516), Lord Langdale says, "It was said that solicitors are in the habit of charging for services and business which they never perform, and that, therefore, the charge for attending the settling is no proof that there was any such attendance. Now, I have been informed that solicitors frequently do charge for particular acts of business, which upon the occasion to which they relate may not have been necessary or required for the interests of their client, and this because, in the taxation of costs for the whole business done, such charges are allowed, whilst the charges allowed for other services of the utmost value and importance, truly rendered to these clients, are so inadequate, that unless some compensation were allowed in another way, no adequate remuneration would, upon taxation, be given for the transaction of the whole business. It is much easier to censure than to remedy this state of things, which, under all the circumstances, is more to be regretted than blamed. The blame which there may be is more with higher authorities than with the solicitors, who, having regard to the rules of taxation, cannot help themselves."

One obvious consequence of the system is, that an attorney and solicitor's bill is, of all things in the world, the most perplexing and unsatisfactory to a client, who is in general ignorant

of the *rationale* of the matter, or, at least, unwilling to admit its soundness. As there are no charges directly applicable to the mental labour and careful consideration bestowed on the business accomplished, he naturally concludes that these qualities have been very little put in requisition; he takes the thing as he finds it, and he complains, with some show of reason, of the charges for attendance upon attendance, for letter upon letter, and for copy upon copy, which he is apt to regard as somewhat like the charges for wax-lights in the continental hotels. The real truth of the matter, however, is, that at the present day, from the simplification of legal proceedings which has been introduced, the old mode of remuneration being still retained, attorneys and solicitors are not adequately paid for many of their most important services, especially in the common law and equity departments of practice; whilst in cases where the authorized charges allow a sufficient recompense, the mode of remuneration gives a false colour to their services. Until their remuneration is placed upon its proper basis, justice will not be done to a most important and useful body of men, nor will the public be put in a position for availing themselves as they might of legal assistance and advice, and of the full benefits which the law was intended to confer.

If a system were elaborately framed for the purpose of securing prolixity, repetition, and obscurity in legal documents, and complication, technicality, and delay in legal proceedings, no system could be better than the present mode of professional remuneration; nor could a better scheme be devised if the object were in every way to lower the position of a body of men to whose honour, fidelity, and skill, the most important transactions of human life are intrusted. The most skilful and experienced practitioner is paid precisely according to the same scale as the least skilful and least experienced; and the greatest of all services, by which litigation is prevented, are either almost unremunerated, or are remunerated without any reference to the importance of the object effected.

The inadequacy of the present scale of fees for chancery and conveyancing business has been set forth with so much force and clearness by Lord Lyndhurst, in a speech in the House of

Lords, March 26, 1855, in the debate on the Despatch of Business—Court of Chancery Bill—that it is desirable to quote here a passage from it, as illustrating what has already been said:—"For example," says his Lordship, "in the case of a complicated account, or an intricate pedigree, to enable the judge's chief clerk to get through it in one sitting, required, perhaps, a whole month's previous preparation by the solicitor. For such preliminary labour, however, no fee was allowed; and yet, if that labour were performed in the presence of the officer (whose time was consequently wasted), the solicitor received the payment that was otherwise denied him. Thus, although speed and simplicity were the client's interest, dilatoriness and intricacy were the interest of the solicitor. So, again, with regard to conveyancing: if a solicitor drew a deed or will of a given number of folios, he was entitled to a certain fee; whereas, if he sat down, and, by bestowing great pains upon the document, succeeded in abridging its length by one-half, he would lose half his remuneration. A premium was, therefore, held out to verbosity, and the solicitor's interest was made to stand in direct antagonism to that of his client. Further, when a solicitor gave advice in the progress of a suit, he received no fee; but if he saved himself the trouble and responsibility of giving such advice, and laid the papers relating to the cause before the counsel, he was entitled to charge several guineas for his profit. And if a plaintiff's solicitor appeared before a judge in chambers, and argued against counsel on the other side, he would only receive for doing his own work and that of a counsel, £2 or £3; whereas the defendant's solicitor, who perhaps only sent a young clerk with counsel, would obtain £6 or £7. Could any thing be more absurd, unequal, unjust, or impolitic, than such a mode of remunerating professional men?"

The same evils and anomalies exist in the other great department of business—that of common law—although in the most important matter a step has been taken in the right direction since the Common Law Procedure Act, 1852, in authorizing the masters, instead of the former limited fee of 13*s.* 4*d.* for instructions for a brief, to allow whatever they may think a reasonable remuneration.

Nor can any thing be more unfair than the position in which the present system places the profession with regard to many important questions relating to the amendment of the law. In some cases, indeed, it may be suggested, that, as legal proceedings are rendered cheaper and more expeditious, they will increase in number, and thus compensate for what is taken away. It is questionable, however, from the experience of the profession, whether this is altogether a sound view of the matter. But there are cases to which even this doctrine is clearly not applicable; and of these the most important is the transfer of land. On this subject all sound social, and economical views are in favour of the introduction of some method by which land may be transferred in a cheap and easy manner, and no scheme will satisfy the people of this country in which this object is not attained in the highest degree possible. But any scheme which will at all come up to the popular wishes on the subject, must necessarily lessen the emoluments of the profession, if the present system of remuneration is to continue; and therefore, as part of that scheme, or in connection with it, the remuneration for services relating to this department of professional practice must be placed on a new basis. On this subject the commissioners on the registration of title have made some very just observations at the conclusion of their report, which it is necessary to bear in mind when considering their scheme with reference to the interests of the profession.

In another way, also, the adherence to the present mode of remuneration has injuriously affected the amendment of the law, especially with reference to procedure. For the purpose of saving expense, where the sum in question is small, various efforts have been made to afford a simple and speedy procedure. But proceedings in which large sums are involved have by no means shared, to the same extent, in the improvements which have been introduced into the courts of law and equity. And, accordingly, it has been said by a member of this committee on another occasion,¹ "That our courts now reverse the order of the railways, and insist on sending their first-class passengers by

¹ Paper read by Mr. E. W. Field at the meeting, held at Manchester, 1857, of the Metropolitan and Provincial Law Association.

their slow parliamentary trains, making them stop at every possible stage, while it is the third class folks who are made to travel by express." Now, under a proper system of remuneration, where the substantial value of the services was taken into account, there would be no inducement to adopt any thing but the best procedure viewed with relation to the ends of justice, whether the sums involved were great or small.

On the evil effects of the present system of remuneration on the amendment of the law, we are happy to be able to fortify ourselves by the opinion of Lord Brougham, expressed before the Committee of the House of Lords, in July, 1851, on the Masters' Primary Jurisdiction Bill. "The other cause," says his Lordship, "of delay and expense is the perfectly faulty mode of remunerating professional men, solicitors especially; but I do not except counsel. This opinion is the result of my whole professional experience and observation, and it is not confined to proceedings in equity. The subject is one of great difficulty, but it is of yet greater importance; and I feel assured that whatever other changes are effected to improve our system, whether of equity or common law, a large proportion of the evil will remain, unless this difficulty shall be grappled with and overcome."

The truth is, that, amend the law as we will, and reduce procedure to its most natural condition as we may, so long as the present system of remuneration remains, the public will never enjoy the full advantage of whatever improvements may be introduced. There is no secular profession which is more under the influence of custom and tradition than that of the law—none which acts more under the domination of professional ideas—none in which there is a stronger and more pervading class spirit. Unquestionably, the feeling thus engendered is productive of much good, by inducing, as a general rule, upright and honourable conduct on the part of its members, and by making those who act unworthily understand their true position. But, with respect to the interests of clients, it may be questioned whether this feeling operates in all respects in an equally favourable manner, since there can be little doubt that, from the mode of remuneration which has prevailed, acting

along with the necessary formalism of the legal mind, the public opinion of the profession has established, as a general rule, that whatever gets into the hands of the law must be made to go through certain orthodox processes, without reference to utility or sound reason. Hence the comparative neglect of the provisions of the Act for simplifying the conveyance of real property (8 & 9 Vict., c. 119); and hence, also, the tendency in every case where procedure has been simplified to pass through all the stages that are still allowed, and always to adopt the longer course in preference to the shorter where there is a discretion in the matter. Indeed, the whole legal system of this country might be shown to be affected by the views and sentiments to which we refer. Now, there can be little doubt that the creation of an opposite public opinion in the profession would be of great advantage to clients, and, in fact, to the whole community; and the likeliest mode of effecting this appears to be, by making remuneration for legal services depend on the real and necessary work done, and thus causing brevity and speed to be considered as the acknowledged interests and standing rules of the profession.

It is obvious, therefore, that it is not only the profession, but the public also, who suffer from the present mode of remuneration; and we take upon us to say, after mature consideration, that the part of the mischief borne by the latter is out of all proportion greater than that borne by the former, great as that is, and heavily as it presses on them. For it is not merely from the fact that the amendment of the law is thereby retarded, or rendered all but nugatory, and that legal instruments are made prolix and unintelligible, and legal proceedings tardy and complex, that the public suffer—they suffer far more seriously from the strong inducement which the system holds out never to employ lawyers unless compelled by the last necessity. How much of endless and expensive litigation—how much of pecuniary loss to families and individuals—how much of social evil—arises from professional assistance not being sought in proper time, or from parties attempting to do for themselves what only a lawyer can do properly, is known to every practitioner and to every layman

of much experience in the world. Under no system of jurisprudence, suited to the wants of an artificial and complicated state of society, would it be possible for every man to be his own lawyer. The utmost, therefore, that any sound and judicious law reformer can aim at is, on the one hand, to render the law as simple and natural as may be consistent with the wants of the community; and, on the other, to remove every obstacle which may prevent the services of the profession from being available, in the fullest degree, to those for whom the law was intended as a shield and not as a snare.

Even with regard to matters of business, commercial or private, which seem to those engaged in them to have little reference to the provisions and rules of the law, how much of loss and anxiety might be prevented by professional advice obtained before the irrevocable step is taken! The doctrine of the law, that every man is supposed to intend the necessary consequence of his own acts, is essential to any regular and consistent legal system, but it renders necessary the utmost circumspection in dealing with our own rights or with those of others. The profession has no higher duties to perform towards the public, and can confer no greater benefit on individuals, than by giving counsel with regard to any acts which may have legal consequences. And if any mode of remuneration tends to cause its services to be called for only when the mischief is done, and to make it merely the *mæstis præsidium reis*, a great evil is produced, which must deeply affect the welfare of society.

That the present mode of remuneration operates in this way, very little doubt can be entertained. Throughout all classes of the community there exists a strong aversion to consult a professional man, where it can possibly be avoided; and this aversion arises in a great measure from the feeling, that the mode of charging is unfair, and that there is no security that the bill of costs will properly represent the work done, or that the work done will be the legitimate and necessary work which the occasion required. Such a feeling is natural, and has been found to operate in the same way in the case of every employment where a similar mode of payment has been adopted; and accordingly,

in our day, the natural mode of remuneration—the direct payment for actual services—has, in all matters of importance, where men have been free to act, almost entirely superseded the artificial system. The truth is, there is nothing as to which men in general are more keenly sensitive than as to the mode in which they are required to pay for services rendered to them; and the advantage of the direct mode is at once felt wherever it is adopted. Few things have tended more to make the railway system of travelling popular in this country than the direct payment of fares, which cover all the charges connected with the conveyance of passengers. But no instance, with reference to the subject under consideration, can better show the advantage of adopting this mode than that of the medical profession. The custom of paying physicians and surgeons directly for their services has long prevailed, and complaint has been seldom expressed, except on the part of those who are unable to see why great skill and experience should be suitably rewarded; but, until recent years, general practitioners were universally paid according to the quantity of medicine administered to their patients. The consequence was, that the latter could scarcely avoid the suspicion that medicines were given to them, not simply for therapeutic purposes, but in order to make up a charge; and the system did, in fact, lead to a most outrageous system of *dosing* the community, against which homœopathy seems only a natural reaction. Of late years, however, the general practitioners have, to a great extent, seen the propriety of accommodating their mode of charging to the feelings of mankind and the scientific practice of medicine—a change which has been to the advantage of a most useful and respectable body of men, and to the still greater advantage of the constitutions of her Majesty's subjects.

It is clear, therefore, on all the grounds which have been now stated, that the question of the remuneration of attorneys and solicitors is one in which the public have the deepest interest; and that no mistake can be greater than to suppose that it merely concerns the profession. If, under the present mode, the profession suffer, far greater and more weighty is the evil which falls on the public.

Indeed, the objections to such a system as that which now prevails meet us on every hand. A mode of paying for real services by paying for factitious services, is altogether objectionable in principle, whether considered morally or economically. No rule of justice can be clearer than that, if a man is to be recompensed for his labours, those labours should be fairly estimated, and their value deduced from their real character and results; and no ground of policy can justify the introduction into one of the most important dealings of human life of what, to use the expression which a great living writer has made current, are neither more nor less than *shams*.

Economically considered, the system will not stand a moment's examination. The real and substantial work of an attorney and solicitor, being essential for the due production and distribution of wealth and the exchange of commodities, may fairly be considered as productive labour. But all the work which is unnecessary, and which is done merely for the purpose of raising a claim for remuneration, is strictly unproductive. Such labour tends in no degree to the creation of wealth, and might as well, for all economical purposes, be expended in attempting to twist ropes of sand, or to fly to the moon. Even the rule which prevents an attorney and solicitor from taking security for costs, is in violation of sound economical principle, as it must tend to operate in one of two ways; viz. either to prevent the legal business of persons whose means are doubtful being undertaken at all, or, if undertaken, to induce the attorney and solicitor to make his charges as high as is possible under the existing system, for the purpose of covering the risk.

But the radical objection, in an economical point of view, to the present mode of remunerating attorneys and solicitors, is derived from its interference with the natural relations between employers and employed. The principal of competition is admitted, by most persons of intelligence at the present day, to be the sound principle with reference to all other labour, mental and bodily. And if so, why should an exception be made in this particular case? None of the arguments which have been brought forward in favour of the exception, at all justify this

flagrant interference with so unquestionable a principle. It is said, in the first place, that attorneys and solicitors are officers of the courts, and as such enjoy a species of monopoly. But it is quite obvious that no monopoly is enjoyed by attorneys and solicitors more than by the members of any other profession—the medical, for instance; and if in a certain sense they are officers of the courts, the summary jurisdiction which the courts possess over them, and the power of admission or striking off the rolls, are sufficient checks on them considered in this relation. It is unquestionable that in modern times this relation by no means determines the real position of an attorney and solicitor with reference to the question of remuneration. Even with regard to court business, every client has the most unlimited power of choice as to whom he shall employ as his legal agent; and many of the most important duties of an attorney and solicitor have no connexion with proceedings in courts of law and equity, whilst the highest duty, perhaps, which he has to perform, and which under a better system of remuneration would be indefinitely enlarged, is that of keeping his clients out of the courts altogether.

Another ground on which the present system is defended is, that if the terms of remuneration were left to be arranged between the attorney and solicitor and his client, the latter would be incapable of judging what was a proper charge, and would therefore be left to the mercy of the former. If there be any truth in this notion, it is clear that the system of scales ought to be extended through most employments in which human beings are engaged. In the great majority of cases the employed, from his peculiar knowledge, must have an advantage over the employer in settling the terms of remuneration; but the principle of free competition is the only trustworthy safeguard against injustice, and, if fraud be introduced, that, the law wisely provides, shall vitiate the contract.

Nor is it any answer to the sound economical view of the question to say, that there are many departments of professional business in which it would be impossible beforehand to come to any agreement as to the terms of remuneration. Practically it

has been found possible to adopt the system of agreements generally in some of the States of North America; but no one has ever contended that it would be proper to enforce agreements in every case. All that is sought for is, that it should be open to the parties to enter into them or not, as they may think desirable, and that the natural laws which would regulate the rate of remuneration for professional services should have free scope. Experience, in this as in other things, would satisfactorily show what was the proper course for the interests of all concerned.

It may be safely asserted, therefore, that there is nothing either in the position of attorneys and solicitors as officers of the courts, or in the nature of the business which they perform, which renders it necessary, in their case, to depart from the great and unquestionable principle of allowing the terms of remuneration to be settled between the employer and the employed. Whatever terms have been agreed on ought, in the absence of fraud, to be enforced where they are in favour of the attorney and solicitor, as well as where they are against him. Under such a system, the market value of the services of an attorney and solicitor would as easily ascertain itself as in the case of any other employment where skilled labour is required; and the mode of payment, whether by a percentage or otherwise, would speedily be determined on obvious considerations of convenience; and there can be no doubt that, under such a system, clients would very soon come to know what the real nature of professional services is—a species of information which the present mode of remuneration seems elaborately contrived to prevent, but the absence of which operates unfavourably both towards attorney and client.

On the question of the remuneration of the bar we have not thought it necessary specially to enter, because, although fully agreeing with Lord Brougham in the opinion already quoted, that the mode of remunerating counsel is also faulty, the subject is not one in which the public have so direct and obvious an interest as in what relates to the remuneration of that which is called the other branch of the profession, to which every thing is

primarily intrusted, and which is alone responsible to clients. We think it enough, therefore, to state that, in so far as the fees of counsel are regulated by the scales, on the same principle as the charges of attorneys and solicitors, the same objections apply with equal force; that with regard to fees determined by the etiquette of the profession, that is a matter for the consideration of the bar, with reference to its own interests and the interests of the community; and that with respect to the case of individuals, who, from the eminence of their position, can fix their own fees, there can be no objection to their doing whatever they find most advantageous to themselves. Nor, after all, can it be doubted that a change in the mode of remunerating attorneys and solicitors would powerfully influence the mode of remunerating counsel, and speedily bring it into adaptation to the real interests of the community. Such a change, it may be confidently predicted, would beneficially effect all the relations of the public to our legal system, every matter connected with legal proceedings, the whole administration of justice, and the whole practice of the law.

But, as in all reforms where the interests of large bodies of men are concerned, it is well, as Lord Bacon has expressed it with regard to innovations generally, to "follow the example of time itself, which indeed innovateth greatly, but quietly, and by degrees scarce to be perceived," it may be questionable how far it would be expedient to adopt at once a system of perfect freedom. Nor can the views of those who think that there is something exceptional in the case of professional remuneration be entirely overlooked in dealing with the practical question now under consideration. It is obvious, also, that under any system there must be some mode of taxing costs as between party and party; and there is a large class of cases where costs are ultimately to be paid out of the fund in court, in which the court, considering itself as the trustee of the fund, necessarily exercises a discretion as to what costs shall be allowed. In such cases as those last mentioned, therefore, and in all cases where no special agreement had been entered into, or where the agreement did not fix the sum total of remuneration, or where the agreement, on account of any element of fraud or covin, was

void, it might be proper that the *quantum meruit* of the services of an attorney and solicitor should be determined by an exceptional tribunal. The present mode of taxing costs by officers of the court is satisfactory neither to the public nor to the profession; and what would seem best to meet the requirements of both would be a board composed of persons practically acquainted with accounts and the usages of commerce, as well as of men conversant with the details of a solicitor's business. A mixed board of this nature would be able to take into account all the elements that ought to enter into an estimate of the proper remuneration of professional services, and might be safely intrusted with great discretionary powers as to the fairness of contracts, and as to the real value of services rendered.

But even with a board so constituted, and intrusted with such discretion, it would be advisable, both for the guidance of the public and the convenience of the profession, that there should be scales of charges having reference as much as possible to the substantial work done, and founded, as far as may be practicable, on the principle of a percentage on the value of the property dealt with, as has been adopted in Scotland. These scales should be at a higher rate than the ordinary charges, so as practically to induce an agreement to be made at the commencement of every employment, where it could be done without inconvenience; but in the absence of such agreement, it should not be obligatory on the board to allow the full charges fixed by the scales. Of course, a different set of scales must be provided, and a different rule followed, in the case of taxation between party and party. With regard to determining the scales as between attorney and client, it would be of great importance that this should be done by some authority independent of the board; and to make this authority perfectly satisfactory to the public, it would be necessary that it, as well as the board itself, should possess a commercial element. Hitherto the scales have been fixed by the judges with more or less assistance from the profession; but in doing so they have acted without the slightest reference to economical principles, and have in general followed the precedent afforded by the prothonotaries in 1733, and ignored all the circumstances of modern times. It is essential, therefore, that

the scales should now be determined on broader views, and with a more just perception of the present position of attorneys and solicitors ; and for the purpose of doing justice to the profession itself, no less than for the satisfaction of the public, it would be necessary to have the assistance of laymen as well as of men engaged in the practice of the law.

A board constituted as has been proposed, and guided by scales determined in the manner suggested, would properly be invested with a primary jurisdiction in all cases ; and although, for the sake of convenience, local taxation should still be allowed, yet an appeal should in every instance lie to the board. For the purpose also of ensuring uniformity of practice throughout the country, all bills of costs taxed by the local authorities should be transmitted to the board, and the whole taxation of costs, both central and local, be annually reported on to Parliament. This annual report might be made to embrace the nature of the causes, the duration of each suit, and of its different stages, and such other particulars as might be necessary to make the returns present an accurate and comprehensive scheme of judicial statistics, relating to some of the most important facts connected with the administration of the law. Of course, with a Minister of Justice, the proposed board would fall under his department, but, until such an officer be appointed, it might act subject to parliamentary control.

The committee have embodied the above views and suggestions in a series of resolutions, which they have now to submit to the society :—

1. That in the case of payment for professional services, there is no reason for departing from the ordinary principle of the remuneration of labour as a matter to be settled between employer and employed.
2. That the system of imposing uniform fixed scales of legal remuneration is an infraction of the above principle.
3. That in settling the amount of remuneration for legal services, consideration should be given to any special agreement which may have been entered into by competent parties.
4. That where no special agreement has been entered into, or where the agreement does not fully determine the sum total of remuneration, or where the question of the fairness of the contract as between the parties

is under consideration, there should be a proper board for deciding as to the amount of remuneration, such board being possessed of great discretionary powers as to the fairness of contracts, and the real value of services rendered, and being so selected as to ensure the confidence of the public and the profession.

5. That in such cases, for the guidance of the public and the convenience of the profession, there should be a scale of charges, and that such scale should be constructed at a rate higher than what is ordinarily charged, so as practically to induce an agreement to be made between the parties at the commencement of every employment, it not being obligatory on the board, however, to allow the full charges fixed by the scale, the same being treated as a maximum allowance only.

6. That to secure, as far as possible, the due influence of mercantile views on the taxation of costs, the board should be composed of persons acquainted with accounts and the usages of commerce, as well as of men practically conversant with the details of a solicitor's business.

7. That the scales should not be permitted to emanate, as at present, solely from legal authorities, but should partly proceed from commercial sources: and that such scales should be fixed by some authority independent of the board.

8. That such board should have a primary jurisdiction in all cases, and that, where local taxation might take place, an appeal to the board should be allowed.

9. That to secure, as much as possible, uniform practice throughout the country, all bills of costs taxed by the different local authorities should be transmitted to the board, and be annually reported on to Parliament.

10. That inasmuch as the expense of legal proceedings arises, to a considerable extent, from the inefficiency of courts, and from the rules of practice followed therein, the annual report so to be made should embrace the nature of the causes, the duration of each suit, and of its different stages, and, as far as the same could be discovered, how far the time occupied in the different stages was unavoidable.

ART. XI.—FRENCH CONSTITUTIONAL LAWS.

WE have no vocation to meddle in any way with the form of government which our neighbours, whether in France or in any other country, choose to live under. This entire abstinence, even from comment, on their political habits or tastes, is peculiarly incumbent on those who, like us, do not even enter upon the controversies of our home politicians, unless where the jurisprudence of the country is concerned ; and in like manner our only concern is with the legal systems, and especially the progress, of other nations, in amending their laws. And it would be most gratifying to us could we perceive in the recent history of our ancient and most important neighbours, a tendency to improvement of their judicial institutions. They have of late held very cheap the objections raised in this country to a most desirable, if not absolutely necessary, amendment of our law ; objections grounded on the not very rational position, that we should avoid doing any thing which may be satisfactory to a foreign government, however just towards it, and however fitting for ourselves the proposed improvement may be. In the justice of these objections we entirely concur ; and we hope that, in the spirit of them, we may be allowed to express a wish to see some relaxation of the severity of their new criminal law as regards political offences, and a hope that the anxious desire prevailing in this country for such a modification of the repressive policy, may not be held an insuperable objection to pursuing a course so just and so wise in itself. A law cannot be otherwise than universally disliked which places so many thousands of persons—but it is quite enough if there are hundreds only—under the arbitrary control as well as the close superintendence of the police, leaving them in perfect uncertainty from day to day, whether or not they shall be sent to some distant residence, or even out of the country ; and if these persons so at the mercy of the constituted authorities, that is, of secret informers, have all of them been upon former occasions under accusation, but never brought to any trial, much less convicted, considering how frequent of late years

have been the changes in the government, and the outbreaks, with their attendant arrests, it cannot be doubted that a considerable number of persons in most parts of the country, are thus, to all intents and purposes, deprived of civil rights, and placed beyond the protection of the law.

That this regimen may for a while be requisite, in order to prevent attempts dangerous to the established order of things, is very possible; that its duration should be strictly confined to the continuance of an extraordinary, and, of course, a passing state of circumstances, is quite manifest; and, nothing can be more groundless than the suggestions so often made, that no real harm was done, because the evil-doers alone are the sufferers. This would furnish an apology for the most arbitrary government at all times. Indeed, the advocates of such a system were forced to represent it as, in itself, quiet, gentle, inoffensive; that, let it alone, you will never be injured by it. There was a late trial on the Western Circuit, in which a young lady brought her action against the owner of a bear for serious injury sustained by her from the animal. The defendant produced witnesses to prove that there never was so quiet, so gentle, so inoffensive a creature—that he fed with the calves in the farm-yard, ate grass and roots, and never before had been known to lift a paw upon a human being. So, absolute governments and arbitrary power are generally harmless, but their instinct remains; it may at any moment break out; and in its neighbourhood nothing like security can exist, nor is there any comfort to the victims that it is subject to the same anxieties and terrors which it inflicts upon them.

Short Notes of Cases:

BEING A SELECTION

or

ADJUDGED POINTS

REPORTED SINCE 1ST FEBRUARY, 1858.

POINTS DETERMINED IN THE COURT OF CHANCERY.

By O. D. TUDOR, Esq., Barrister.

COURTS.

REPORTERS.

The Master of the Rolls	23 Beav., Part 3, Vol. xxiv., Part 1.
Vice-Chancellor Wood	3 K. & J., Part 5, Vol. iv., Part 1.
Lord Chancellor and Master of the Rolls of Ireland, and the Court of Appeal in Chancery	} 6 Ir. Ch. Rep., Parts 10, 11, and Vol. vii., Parts 1 and 2.

I.—POINTS DETERMINED IN THE COURT OF CHANCERY.

1. Alien—Trust for—Rights of the Crown—*Rittson v. Stordy* (3 Sm. & G., 230) dissented from. 2. Administration Suit—Creditor—*Costa*. 3. Conversion—Reconversion. 4. Executory Trust—Settlement. 5. Documents—Order for Removal of Abroad—Examination of Witnesses. 6. Jurisdiction—How far Equity will Interfere to Preserve Property pending Proceedings at Law—Waste. 7. Marriage—Parol Contract in Consideration of—Statute of Frauds. 8. Merger—Presumption. 9. Mines and Minerals—Leases—Surface—Right to Support of. 10. Practice—Settled Estates Act (19 & 20 Vict., c. 120)—Consent of Married Woman. 11. Production of Documents—Discovery—Suit for—By Heir in Aid of Ejectment—Heir in Tail. 12. Railway Company—Preference Shares—Guaranteed Shares. 13. Sureties—Contribution—Admission of Parol Evidence to rebut Claim to. 14. Surety—Entitled to Benefit of all Securities taken by the Credi-

tor. 15. Tenant for Life—Arrears of Interest—Lien for. 16. Trust Funds—Assignees of Bankrupt Trustee—Refusal to Transfer Funds—Costs. 17. Trustee—Breach of Trust—Registration of Judgment. 18. Vendor and Purchaser—Contract to Sell—Vendor Devising to Infants—Specific Performance—Costs of Suit.

1. BARROW V. WADKIN. 24 Beav., 1.

Alien—Trust for—Rights of the Crown—Rittson v. Stordy (3 Sm. & G., 230) dissented from.

A testator devised real estate unto, and to the use of trustees, and their heirs, upon trust for aliens. It was held by Sir John Romilly, M.R., that the *cestuique* trusts as aliens, although they could take, not being able to *hold* the estate, the crown was entitled beneficially to it; and not the trustees, or heir-at-law. After examining all the cases upon the subject, his Honour said, "Against this, which I must consider as a great array of authority, nothing has been suggested to me, nor have I myself discovered anything, with the exception of the *dictum* of the Vice-Chancellor of England in *Burney v. Macdonald* (15 Sim., 6), and the case of *Rittson v. Stordy* (3 Sm. & G., 230), before Vice-Chancellor Stuart. The *dictum* in *Burney v. Macdonald* was not necessary for the decision of that case; and, as I have already so fully commented upon it in what I have already said, I think it unnecessary to add anything further upon it.

"With respect to the case of *Rittson v. Stordy*, before the Vice-Chancellor Stuart, it certainly nominally decides this point; but, notwithstanding the respect I feel for the learning and attentive consideration of the Vice-Chancellor, I am not satisfied with the reasoning on which he founds this part of his judgment; and when I consider that the decision was clearly right on other grounds, and did not require the decision of this point, which has received no affirmance on appeal before the *Lords Justices*, I have thought myself bound to consider the case apart from that decision, and to form my own views of the question on principle and previous authorities, and which, I regret to say, is not in accordance with that expressed by the Vice-Chancellor."

2. FULLER V. GREEN. 24 Beav., 217.

Administration Suit—Creditor—Costs.

A creditor of an intestate, notwithstanding the representations of the legal personal representatives that there were no assets, instituted a creditor's suit against them. It turned out that the representations made to the plaintiff were true. It was held by

Sir John Romilly, M.R., that the plaintiff was bound to pay the costs of the suit, observing that, in such a case, the representatives ought to be indemnified, otherwise they might be mulcted over and over again.

3. MEREDITH V. VICK. 23 Beav., 559.

Conversion—Reconversion.

Freeholds in possession, and copyholds in reversion, were under a will impressed with the character of personalty, being held by trustees upon trust for sale. The person beneficially entitled to them did acts, which, as to the freeholds, were sufficient evidence of his intention to reconvert them. It was held by Sir John Romilly, M.R., that those acts ought not to be considered as evidence of his intention to reconvert the copyholds, and that they therefore retained their notional character of personalty. "If," said his Honour; "a devise be made to trustees in trust to convert *Whiteacre* and *Blackacre*, and pay the produce of the same to A B, does the declaration of A B, that he wishes to hold *Whiteacre* as unconverted, necessarily apply to *Blackacre*? It is a question of intention, and must be dealt with as such; and, as such, I am of opinion that I cannot attribute expressions by a man, which are unequivocal as to freeholds in his possession, as applicable to copyholds not in his possession, and the possession of which might never come to him. It is no doubt urged, that the reversion of the copyholds was in his possession; but it seems to me impossible to attribute an intention to a reversion to be derived from acts which have no application except to possession."

4. STANLEY V. JACKMAN. 23 Beav., 450.

Executory Trust—Settlement.

A father by deed vested funds in trustees, upon trust for all his daughters, and to be settled on them as thereafter mentioned; viz., to settle and assure the share of each daughter upon her, and her issue, so and in such manner and form as that the same might not be liable or subject to the debts, control, or engagements of any husband or husbands whom any such daughter or daughters should happen to marry during the lifetime of any such daughter or daughters. Sir John Romilly, M.R., held that the proper mode of carrying into effect the direction in the deed was this, "To settle the property on the daughter for life for her separate use, without power of anticipation; after her death, to her issue, as she shall appoint by deed or will; and, in default of

appointment, to the issue living at the death of the daughter equally, *per stirpes*; so that any issue then living, more remote than children, shall take (in case of the previous decease of their respective parents or parent) only the shares or share to which their respective parents or parent would, if living, have been entitled; and, in default of issue living at their death, then as the daughters shall by will appoint, and, in default, to her executors, administrators, and assigns.

5. LAFONE V. THE FALKLAND ISLANDS COMPANY. No. 2.
4 K. and J., 39.

Documents—Order for Removal of Abroad—Examination of Witnesses.

Sir W. Page Wood, V.C., held that, except in a special case, the court would not make an order to produce original documents before an examiner, out of the jurisdiction. "I find," said his Honour, "upon inquiring, that none of the registrars of the court has ever known of an instance of an order for taking papers out of the jurisdiction, for the purpose of their being produced before an examiner.

"I am far from saying that this court has not jurisdiction to make such an order. On the contrary, it appears to me that cases might well exist in which it would be right and proper, for the sake of justice, to order original documents to be carried out of the jurisdiction, all proper care of course being taken, by way of indemnity or otherwise, to secure their safe return. But I think that a special case ought to be made to justify an order, which hitherto, so far as I can find, is without precedent.

"I must, therefore, refuse the application."

6. TALBOT V. HOPE SCOTT. 4 K. and J. 96.

Jurisdiction—How far Equity will Interfere to Preserve Property pending Proceedings at Law—Waste.

The plaintiff, Earl Talbot, filed a bill, alleging that he was Earl of Shrewsbury, and that he was entitled to certain estates annexed by Act of Parliament to the title of Earl of Shrewsbury as tenant in tail, that he was entitled to a legal interest in such of those estates as were called the settled estates, and to an equitable interest in such of them as were vested in trustees, and which were called the unsettled estates. The bill also stated that he had, before a committee of privileges of the House of Lords, made out his pedigree, showing him entitled to the Earldom of Shrewsbury except as to three links necessary to establish his claim, and that

upon two of them the Lord Chancellor had expressed an opinion in his favour; that the defendants claiming under the will of the late Earl, who had executed deeds "purporting to disentail the property," by favour of some of the tenants, had entered into the receipt of rent, amounting to upwards of £25,000 per annum, and that they had cut down considerable quantities of timber on the estates, and that some of it was of an ornamental character, and some of it was not ripe for cutting. The bill also charged that many of the tenants of divers parts of the settled estates, by reason of the conflicting claims to the Earldom, refused to pay their rents to either the plaintiff or defendants, and, by reason thereof, rents exceeding £5000 per annum were in danger of being lost. The bill prayed that, pending the plaintiff's proceedings to establish his claims to the Earldom, and his proceeding by ejectment (which he undertook to institute when he had established his claim to the Earldom), a receiver might be appointed, the deeds and documents secured, &c., and the defendants restrained from cutting any timber or trees being or growing on the premises. As to so much of the bill as sought relief in respect of the settled estates, a demurrer was allowed; as to the rest of the bill, a plea that the plaintiff was not Earl of Shrewsbury was allowed.

Sir W. Page Wood, V.C., in his elaborate judgment, after observing that, as a general rule, the court will not interfere at the instance of a person alleging a merely legal title in himself, against other persons in possession of the estates, to grant a receiver, and put them out of possession—added, "The ground of the rule adopted by the court in this respect I conceive to be extremely sound; the general ground being, that the court cannot interfere with a legal title of any description, unless there be some equity by which it can affect the conscience of the defendant. Where there is an entire want of privity between the plaintiff and the defendant, and the defendant is simply a wrongdoer at law, the court does not take upon itself to interpose, unless in certain very exceptional cases.

"One such exceptional case is that of destructive trespass against property of which another is in possession: a mere trespasser comes upon property as to which he recognises your right to possession, and invades that property either by mining, or by cutting down timber without a colour, or shadow, or pretence of title, and the property may be destroyed before you can arrest his proceedings at law. But even that was not recognised as a case for the interference of the court until after a considerable struggle in the mind of Lord *Thurlow*—who, I believe, is to be considered as having established the doctrine that, in such a case, the action

of the court may be safely invoked—nor until he himself had several times refused to act under such circumstances.

“Subject to these exceptional cases, the rule is as I have stated. As regards the enjoyment of the ordinary rents and profits of an estate, the court has never assumed a right to interfere with that title which the law confers upon every *terre tenant* in possession of real property—a title to be traced, no doubt, to the feudal doctrines of our law, by which the lord had a right to require that he should always be able to know his tenants—possession on the part of the tenant was the best means of affording to the lord that knowledge; and the tenant who owed duties to his lord (and very onerous those duties were at the period when the feudal law was in its full vigour), had a right to all the benefit of the property in respect of which he was bound to perform such duties. The title by possession has been always treated by the law as so sacred, that it is well known to many of us, from the cases to be found in the books and otherwise, that some estates in this kingdom are held without the least pretence of any other title. Many estates have been originally entered upon simply under a devise from a mere tenant for life, proved most satisfactorily to be merely tenant for life; and yet, upon the ground that the court recognises the person in possession as the owner—till some other person, by a stronger title, has cast him out, unless it can find something in the shape of fraud, which was the case in *Huguenin v. Baseley* (14 Ves., 273), something by which it can fasten upon the conscience of the person so in possession—the court invariably refuses to interfere.”

After a close examination of all the cases upon the subject, his Honour said—“The result of the authorities is, that there is no case whatever of such interference. The judges have declined to say—and I respectfully beg to follow them in declining to say—that there may not be a case made out even with reference to real estate, which would be acknowledged by every one to be a case for interference. I do not deny that there may be a possible case in which, while the parties are in litigation on a merely legal title, there may be such utter destruction carried on, such stripping of the estate of its timber (to take the cases put by Vice-Chancellor Knight Bruce in *Haigh v. Jagger*, 2 Coll., 235), or pulling down the capital messuage, or such other circumstances, as might justify interference. The dicta only go to such cases; in those dicta I entirely acquiesce; and if such a case should arise, I would not, for one moment, suggest doubts whether so salutary a jurisdiction might not be exercised for the prevention of such malicious acts of spoil, trespass, and injury, while the rights of the parties are in litigation. But, looking at the authori-

ties, I must say that it will require a *clear case* of that description to be made out before the court can be called upon so to interfere."

In the same cause, however, the plaintiff, the Earl Talbot, was more successful, in a motion for a receiver under the following circumstances:—

Under two Acts of Parliament, 43 Geo. III. c. 40, and 6 & 7 Vict. c. 28, part of the Shrewsbury estates were vested in the defendants as trustees, to sell and invest the proceeds in the purchase of other lands to be inalienably annexed to the Earldom of Shrewsbury. The last Earl attempted to disentail this estate, and devised it to the same trustees upon trust for a particular claimant, and the trustees accepted that trust, and claimed to receive the rents in that character. Sir W. Page Wood, V.C., pending the proceedings of the plaintiff to establish his claim to the Earldom, appointed a receiver of the estates (if any) vested in the trustees, of which the tenants were not paying rent to them; and the defendants were put upon an undertaking as to the rest of the estates, to invest and accumulate the net rents in their joint names until the hearing. "It is not," said his Honour, "the case of a person who claims a beneficial or adverse interest, having the legal estate afterwards cast upon him; but it is this:—Two persons, being trustees for the right Earl of Shrewsbury, have chosen to accept another trust, which makes it their business and (as they may conceive) their duty to avoid discovering that person—in other words, to avoid the very duty which it was incumbent upon them under their original trust to discharge."

7. WARDEN V. JONES. 23 Beav., 487.

Marriage—Parol Contract in consideration of—Statute of Frauds.

By the express enactment of the Statute of Frauds, a parol agreement made upon consideration of marriage does not constitute a valid agreement, and no action can be brought to charge any person upon it. Thus, in the above-mentioned case, where a man previous to his marriage entered into a parol agreement to settle the property of his intended wife, but the property was not settled until after the marriage, it was held by Sir John Romilly, M.R., that the parol agreement before marriage was inoperative under the Statute of Frauds, that the marriage was not a part performance so as to take the contract out of the Statute, and that consequently the settlement, being without consideration, was void as against the husband's creditors. His Honour, in giving judgment, noticed a distinction between cases where the husband

enters into a parol contract before marriage with his wife, and where third parties enter into a parol contract with him to settle property. "The doctrine of part performance," he observed, "does not apply to cases between mere husband and wife; but where a third party on behalf of the wife enters into a contract with the intended husband, to do something which is performed by the husband, the court enforces the contract against the person who entered into the parol contract for the benefit of the lady."

8. GUNTER V. GUNTER. 23 Beav., 571.

Merger—Presumption.

A person entitled to the fee simple of property, bought up a building lease thereof, and caused it to be assigned to a trustee in trust for him, "*his executors, administrators, and assigns.*" It was held by Sir John Romilly, M.R., that the presumption in equity was that the lease had not merged in the inheritance. "It is true," observed his Honour, "that where a charge is simply paid off by the owner of the inheritance, it is to be assumed that it is merged, and the burden of proof is on the person who contends that it is still subsisting; but though this observation applies to a case where there is a simple payment off of the charge by the owner of the inheritance, this is a matter of inference only, and may be rebutted by evidence, as well as by the mode in which it is done. Thus, if the form be such as to keep the charge on foot, the burden is shifted in consequence of the presumption of an intention to keep it on foot, arising from such being the form of the transaction. The burden of proof is then on those who seek to establish that, notwithstanding the form, it was intended by the person paying off the charge to merge it in the inheritance."

9. DUGDALE V. ROBERTSON. 3 K. & J., 695.

Mines and Minerals—Leases—Surface, Right to Support of.

Where the owner of lands demised the minerals under them, he was held by Sir W. Page Wood, V.C., in the absence of words showing that he had waived or qualified his right, to be entitled to the natural support for the surface which he had before the demise. "The common-law right," said his Honour, "is now clear from the decision of the Court of Queen's Bench in *Smart v. Morton* (5 Ell. & B. 30), although that did not carry the law further than the decision of the Court of Exchequer in *Harris v. Ryding* (5 M. & W., 60). In *Smart v. Morton* there was a

plea that, in the deed by which the surface was granted to the parties through whom the plaintiff claimed, there was an express reservation of the mines, with liberty to work those mines and drive shafts, and use any other ways for the better and more commodious working and winning the same, and the grantor covenanted to pay treble damages for such loss or damage as should be sustained by the grantee; that it was in the necessary and needful working of the mines that the defendant had caused the damages complained of, and that he was ready to pay damages according to the covenant. But, on demurrer, the Court held that the plea was bad; for the occupier of the surface had a *prima facie* right to the support to the subjacent strata, and the deed did not authorize any working in derogation of that right.

"And so, conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common-law upon every demise of minerals or other subjacent strata, that the lessor is demising them in such a manner as is consistent with the retention, by himself, of his own right to support, as in the case put in the judgment of the House of Lords (2 Macq., 449) of a demise of the upper part of a house. If I demise to you the lower story of a house, and reserve to myself an upper story, the presumption is that I do not part with my right to be supported by the story I demise.

"It is true, there may be an express stipulation, as there was in *Rowbotham v. Wilson* (25 L. J. Q. B., 362), by which the owner of the surface waives his right to support, and agrees to allow the mines to be so worked as to destroy his property; but in the absence of express words, shewing distinctly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma* as it was before, and with that natural support which it possessed before he parted with the subjacent strata; and so it would be in the case of a watercourse, or other easement of a like nature."

10. IN RE BREALY'S SETTLED ESTATES, IN RE MANSON'S SETTLED ESTATES. 24 Beav., 220, 221.

Practice—Settled Estates Act, 19 & 20, Vict. c. 120—Consent of Married Woman.

Where a married woman presents a petition under the Settled Estates Act, her consent under sections 37, 38, should be taken immediately after the petition has been answered, but before the advertisement has been issued, and the solicitor to examine her

as to her consent should be an independent solicitor, not concerned in the proceeding. See, *In re Foster's Settled Estates*, 24 Beav., 22.

11. RUMBOLD v. FORTEATH. 3 K. & J., 748.

Production of Documents—Discovery—Suit for—by Heir in aid of Ejectment—Heir in Tail.

Where a bill is filed against devisees, for discovery of documents to enable the plaintiff to proceed in an action of ejectment, a clear distinction has been taken between a plaintiff claiming as heir at law, and a plaintiff claiming as tenant in tail. In the above-mentioned case of *Rumbold v. Forteath*, the bill for discovery being filed by an heir at law, he was held by Sir W. Page Wood, V.C., to be entitled to the production only of such documents, or any part or parts thereof, which related to or tended to show the pedigree of the plaintiff, whereas, had he claimed as tenant in tail, he would have been entitled to the production of the deeds creating the entail. "Where," said his Honour, "the plaintiff claims as heir in tail, he has such an interest in the deed creating the entail that the court, as against the person holding back that deed, will compel its production; and on that ground it was that the order was made in *Lady Shaftesbury's case*. But the principle upon which that order proceeded, has no application where the plaintiff claims as heir at law; and so it was held by Sir William Grant in *Jones v. Jones* (3 Mer. 161, 172), repeating what Lord Rosslyn had said in *Lady Shaftesbury v. Arrowsmith*, that 'all the family deeds together would not make the title of the heir at law either better or worse. If he cannot set aside the will, he has nothing to do with deeds.'

"My only doubt is, whether, in case any portion of the deeds and writings of which production is sought by this motion tends to show, or relates to, the pedigree of the plaintiff, he would not be entitled to production of that portion. In *Hylton v. Morgan* (6 Ves. 293), where Lord Eldon refused, upon motion, to aid the plaintiff in proceeding at law without the authority of this court, in which he was followed by Sir John Leach in *Barney v. Luckett* (1 Sim. & S. L., 419), and *Northey v. Pearce* (id. 420), he still says, 'as to the pedigree, I apprehend a production would be ordered;' and that is the inclination of my own opinion."

12. HENRY V. THE GREAT NORTHERN RAILWAY COMPANY.

4 Kay & J., 1.

Railway Company—Preference Shares—Guaranteed Shares.

Leopold Redpath, a servant of the Railway Company, fraudulently created and issued stock by means of false entries in the books of the Company, and by fictitious transfers, and otherwise, to the amount of about £221,070. These were holders of stock or shares which were "to bear and receive dividends at a given rate per cent. per annum, in preference to the payment of dividends on the ordinary shares of the Company;" and they were entitled to receive such dividends out of profits accruing, and not merely out of profits of the current half-year or years, or any other definite period, before any holder of ordinary shares could participate in any profit whatever. A fund which, under ordinary circumstances, would have represented the half-year's profits of the railway, as shewn at the usual half-yearly meeting, was applied, pursuant to the provisions of a special Act of Parliament, in buying up the fictitious stock, including preference stock issued by Leopold Redpath, and no dividend was declared as previously for that half-year. It was held by Sir W. Page Wood, V.C., that the holders of preference stock or shares were entitled to be paid dividends out of subsequent profits, before any payment could be made to any holder of ordinary shares. "Whether," said his Honour, "the shares in question were preference shares, in such a sense as to entitle them to arrears or not, in either event, except for the third section of the Act, I should not have found any difficulty in the case; because it appears to me, that the purport and scheme of the Act are simply to carry into effect an arrangement, by which, out of the ordinary profits realized by the Company in a certain half-year, and which would otherwise have been appropriated among the shareholders, a common calamity which has befallen the whole Company would be set right.

"As regards that calamity, I entirely coincide in the view taken by the counsel who first advised the Company, that it is to be viewed as any other calamity—the fall of a tunnel, the effect of an inundation, or the like; and although, at first, it occurred to me that there might be some special case made for saying that the preference shareholders, as they are termed, ought to bear a proportion of the loss, regard being had to the forgery of their preference stock, which let in other persons to share in that stock, as well as to the difficulty by which they, in common with the other shareholders, were met in getting any dividend at all, in-

dependent of the Act ; yet, upon further consideration—and even before hearing a reply—it did not appear to me that any such equity could attach to them. It appeared to me that it was simply equivalent to 'a loss occasioned by the fraudulent conduct of a clerk, who might have absconded with a box containing the money that has been lost to the Company. Such a loss could be treated only as a common calamity, and could not, in the slightest degree, vary the position of the several proprietors of stock as between themselves. Like any other calamity, it would have to be met before any profit could be realized ; and any profit which would afterwards be realized would be applied, like any other profit, in payment of shareholders according to their priorities of dividend."

13. RAE V. RAE. 6 Ir. Ch. Rep., 490.

Sureties—Contribution—Admission of Parol Evidence to rebut Claim to.

A and B become sureties for C. Upon the default of C, A and B were sued, whereupon A obtained the necessary funds by a mortgage of property of his own and a judgment against B. Afterwards A paid off the mortgage and took an assignment of the judgment, registered it as a mortgage against the lands of B, and took proceedings for foreclosure and sale. It was held by the Master of the Rolls of Ireland, that parol evidence on the part of B, was admissible to prove a contract on the part of A that he would indemnify him, and thus rebut the equity of A to contribution. "The doctrine of contribution amongst co-sureties," said his Honour, "is not founded on contract, but is the result of general equity, on the ground of equality of burden and benefit. This was decided in *Deering v. The Earl of Winchelsea* (1 Cox, 318 ; S. C., W & T. Lead. Cas., 60). Lord Chief Baron Eyre, in giving judgment, said :—' If we take a view of the cases in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it, as in *Swan v. Wall* ' (1 Ch. Rep., 149). Thus in *Craythorne v. Swinburne* (14 Ves 160), it was decided that a person might take himself entirely out of the principal, as where he becomes merely a collateral surety by limiting his liability to payment of the debt upon the default of the principle and other sureties ; and on a bill in such a case filed for contribution, parol evidence is admissible to show what the real contract was, and to rebut the implied contract which equity raises in cases of contribution. There are other cases to the same effect referred to by Messrs. *White and Tudor*, in the note to *Deering v. The Earl of Winchelsea*.

Deering v. The Earl of Winchelsea was recognised in *Stirling v. Forrester* (3 Bligh, C.S. 575), by Lord Redesdale (p. 590), and by Lord Eldon (p. 596), and also in *Cooper v. Twyman* (Tur. & Russ. 426, 429); at law the principle is much the same. In *Saund. Rep.*, 5th ed., p. 264 a, note (b.) it is laid down :—‘So where two or more persons are sureties for another, and one of them is compelled to pay the whole debt, an action for money paid lies against the co-sureties for their respective proportions, on the implied request and promise.’ It is a settled principle that parol evidence is admissible to rebut an implied contract. *Expressum facit cessare tacitum* is a maxim of the law.”

14. ANDERSON V. ABBOTT. 23 Beav., 457.

Surety—Entitled to Benefit of all Securities taken by the Creditor.

It is a well-known rule that a surety is entitled to the benefit of all the securities taken by the creditor. This rule is applicable although the surety be not aware of the existence of the securities until the institution of the suit. This rule was well illustrated in the case of *Pearl v. Deacon*; there the plaintiff joined in a promissory note to the defendants as a surety for a sum of money advanced by them to their tenant; the defendants, without the knowledge of the plaintiff, took an assignment by way of mortgage of the tenant's furniture, in order to secure the same debt. Afterwards the defendants, under a distress, took the furniture for arrears of rent. It was held by Sir John Romilly, M.R., that the produce of the furniture was first applicable to the payment of the promissory note, and that the landlord could not as against the surety apply it in payment of the rent. “It was said,” observed his Honour, “that this security was not within the scope of the plaintiff's contract, and that a surety cannot go beyond it. That is a mistake with respect to the relation between a principal and surety. Lord Eldon expressly stated, in *Craythorne v. Swinburne* (14 Ves., 164, 169), that the rights of a surety depend rather on a principle of equity than upon contract: there may be a *quasi* contract, but it arises out of the equitable relation between the parties, to be inferred from the knowledge of an established principle of equity. The same doctrine is also stated in *Mayhew v. Crickett* (2 Swansh, 191); and it is laid down distinctly that sureties are entitled to the benefit of every security which the creditor has against the principal debtor, and that whether the surety knows of the existence of those securities or not is immaterial. If the creditor makes available any of his securities, the surety is entitled to the benefit of it.”

15. IN THE MATTER OF JOHN JOSEPH WHYTE. 7 Ir. Ch. Rep., 61.

Tenant for Life—Arrears of Interest—Lien for.

A tenant for life was absolutely entitled to certain charges on the estate. He allowed arrears of interest to accrue due on other charges upon the estate. It was held by the Chief Commissioner of the Encumbered Estates Court, that the right of the remainderman to have the arrears of interest paid, attached by way of lien or retainer on the fund claimed by the administrator of the tenant for life, as a charge on the inheritance, and was not merely that of a general creditor.

16. IN RE PRIMROSE. 23 Beav., 590.

In the matter of the Trustee Acts, 1850 and 1852.

In the matter of the Bankrupt Law Consolidation Act, 1849.

Trust Funds—Assignees of Bankrupt Trustee—Refusal to Transfer Funds—Costs.

Trust funds were standing in the name of two trustees, one of whom was Leopold Redpath, who was convicted of forgery, and sentenced to be transported for life. Leopold Redpath was also made a bankrupt. A new trustee was appointed in the place of Redpath, but the bank refused to make a transfer of the funds into the names of the new and the continuing trustee, unless the assignees in bankruptcy signed a paper disclaiming all interest in the funds. The assignees neglected to sign a disclaimer, in consequence of which a petition for the appointment of a new trustee, and a vesting order of which due notice was given to the assignees, was presented. Sir J. Romilly, M.R., having no jurisdiction to award costs against the assignees under the trustee acts, made the order as prayed, without any order as to costs. In giving judgment, his Honour made the following important observations:—"Although it relates merely to costs, it is a question of great importance with reference to other proceedings, because it does not apply exclusively to assignees or any particular class of individuals, but affects all members of the community, with reference to their duties towards each other, and to the course of conduct they ought to pursue on occasions like the present.

"It appears to me that the proposition must be thus stated:—If the course of events has so placed the fund or property, that the beneficial owner cannot get it without some act done on the

part of a mere stranger to the fund, which act on the part of that stranger involves no responsibility and no risk whatsoever, this court will not permit that person to be merely obstructive, and will not allow him to say, 'I make no claim to it myself, but I will interpose every passive obstacle which I can throw in the way, to prevent your getting the fund. I shall do nothing active, but I shall do nothing to assist you to get the fund.' In such a case my opinion is, that if the passive resistance of this person drives the rightful and beneficial owner into Chancery, and this court perceives that the application to Chancery has become necessary solely by reason of the defendant refusing to do an act which would have involved no risk and no responsibility whatever, then I take the rule to be this:—That the person indulging in this, which I may call unamiable disposition of obstruction, must pay the costs of the application to the court, which he has rendered necessary. It is no answer, in my opinion, for him to say, 'I did not put myself in this position; it is not owing to any act of mine that this has occurred.' The observation is undoubtedly a correct one; but it applies just as much to the rightful and beneficial owner as it does to himself. The relative position in which they are placed arises from no act of either of them, but from circumstances over which neither of them had any control; for I do not treat the act of a person appointing another as his trustee to be the act which has created the difficulty, any more than the fact of the respondent's having accepted the office of assignee has created it. In point of fact, as I before stated, the position in which they are placed, arises out of circumstances for which neither of them is in any respect responsible.

"Neither do I mean to say that a person in such situation is called upon to investigate difficult claims, or to decide upon doubtful rights. I have guarded against this by saying, that the act 'involves no responsibility or risk whatever;' but when none is incurred and all expenses are paid, it is, in my opinion, his duty to afford, to a rightful and beneficial owner, facilities to obtain the property, and not to compel him to waste his money in getting it done through the assistance of this court."

17. LESTER V. LESTER. 6 Ir. Ch. Rep., 513.

Trustee—Breach of Trust—Registration of Judgment.

A trustee is generally liable if he neglects any precaution for rendering the trust property as secure as it may, with due diligence, be made. In the case of *Lester v. Lester*, an unregistered judgment in Ireland, in the year 1847, had been assigned by a

deed in the year 1849 to a trustee upon the trusts of a marriage settlement. The *cestui que* trust, desirous of having some further security, the judgment was in 1851 *registered as a mortgage* against lands belonging to the conusor before the passing of 13 and 14 Vict., c. 29. Neither the *cestui que* trust nor the trustee were aware of the want of proper registration. The judgment was not properly registered until the year 1854. It was held by the Lord Chancellor of Ireland, that the trustee was liable to make good any loss arising from the want of due registration of the judgment.

"The sum secured by the judgment," said his Lordship, "has been lost by the neglect to register it in the manner which the law required. That loss was the consequence of neglect, on the part of the person in whom the legal interest in the judgment was vested, to do an act which he might have accomplished without difficulty. He acted under a mistake in all probability; but he did not obtain correct advice on the subject, and he cannot protect himself from the consequences of his error by having received wrong advice. He had the means of performing this duty; he was the person in whose name it ought to be done, and who was bound to take care of his *cestuis que* trust; and I think I am compelled by the cases to hold the trustee responsible."

18. PURSER V. DARBY. 4 K. & J., 41.

Vendor and Purchaser—Contract to Sell—Vendor Devising to Infants—Specific Performance—Costs of Suit.

"Where a vendor dies intestate after entering into a contract for the sale of lands, leaving an infant heir, and a suit is rendered necessary by that circumstance, or by what may be called the mere act of God, there it may be right to give no costs on either side; but where, as here, the deceased person first contracts, to sell, and then devises his property, so that upon his death it becomes vested in infants, there the necessity for the suit cannot be said to have arisen from the mere act of God. The testator by his own voluntary act has made the suit necessary, and his estate, therefore, should bear the costs."—Per Sir W. Page Wood, V. C.

II—POINTS DETERMINED IN THE COURTS OF COMMON LAW.

COURTS.	REPORTS.
Common Pleas	2 Common Bench, N. S., Parts 4 & 5.
Exchequer;	{ 2 Exchequer, Hurlstone and Norman, Parts 4 and 5.

1. Crossed Cheque—Liability of Banker paying it directly to Holder where the Crossing has been Obliterated. 2. Amendment under C. L. Proc. Act, 1852—Misjoinder of Defendants. 3. Liability of Tenant holding over after Notice to Quit. 4. *Respondeat superior*—Liability of Master for Damage caused by Negligence of Servant. 5. Duty of Landlord distraining for Rent in regard to Surplus Goods. 6. Certiorari to remove Cause from County Court. 7. Party to Action for Goods Sold. 8. Responsibility of Carrier—his Duty when Goods are Refused by Consignee. 9. County Court Practice—What is “Dwelling” within the Statute? 10. Liability of Defendant where Plaintiff contributes by his own Negligence to an Accident. 11. Interrogatories at Common Law—Limits of their Employment. 12. Carrier, liability of—Transmitting Goods through other Carriers. 13. Liability for an Accident at Railway Station, in joint occupation of Two Companies. 14. Undermining Foundation—Right to Vertical and Lateral Support for Messuages. 15. Necessary Precautions for preserving Rights of Communication on Highway—Modern Rule on the Subject.

1. SIMMONS v. TAYLOR. 2 Com. Bench, N. S. 528.

Crossed Cheque—Liability of Banker paying it directly to Holder where the Crossing has been Obliterated.

The point decided in this case, which has excited much interest in the commercial world, admits of being very concisely stated. The statute, 19 & 20 Vict., c. 25, reciting *inter alia* that “doubts have arisen as to the obligations of bankers with respect to cross-written drafts,” enacts, that “in every case where a draft on any banker made payable to bearer, or to order on demand, bears across its face an addition in written or stamped letters of the name of any banker, or of the words ‘and company’ in full, or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker.” This statute was held in the case above named to apply, not to the time when the cheque is issued, but to the time when it is pre-

sented; so that, if the cheque when presented does not bear upon it a crossing, the banker paying it to a casual or even fraudulent holder will be held in law to have had authority to pay it from the drawer.

2. WICKENS v. STEEL. 2 Com. Bench, N. S., 488.

Amendment under C. L. Proc. Act, 1852—Misjoinder of Defendants.

The plaintiff, an attorney, sued for work and labour in the conduct of a suit, on the alleged retainer of the two defendants, in which they were nonsuited. It appeared that one of the defendants had been improperly joined as a co-plaintiff in the original action, and the jury accordingly returned a verdict in his favour, and against the other defendant only, which the learned judge at the trial held to be a verdict for the defendants. Before entry of the verdict, an amendment of the record was applied for and refused, leave, however, being given to move, to enter the verdict against the one defendant only, if the court *in banc* should be of opinion that the amendment ought to have been allowed. It was held that such an amendment ought not to be allowed, the 222nd section of the C. L. Proc. Act, 1852, having no application whatever to the case *sub judice*, and the 37th section not being "intended to apply to a case where a party has been joined as a defendant, not by mistake, but intentionally, and with the deliberate purpose of trying to fix him with liability."

3. BRAMLEY v. CHESTERTON. 2 Com. Bench, N. S., 592.

Liability of Tenant holding over after Notice to Quit.

The point here decided may be thus shortly stated. A tenant holding over after a notice to quit, will be responsible for "any ordinary claim which could be made upon him for not giving up possession pursuant to his contract," by reason of the landlord having been thus prevented from giving possession of the demised premises to a new tenant. In this case Cockburn, C. J., observed as follows:—"I am far from saying that a landlord would be entitled to recover any special damage that might result from his inability to fulfil the contract he has entered into, in consequence of his tenant wrongfully holding over after the expiration of his term, either by effluxion of time, or by a legal notice to quit where he has relet the premises for any special and extraordinary purpose. But here the landlord claims no more than what he has been called upon to pay in the shape of damages, for being deprived of the ordinary use of the land. Having let the pre-

mises, he was prevented from fulfilling his contract with the new tenant, by the wrongful act of the defendant in refusing to go out when his term expired; and for that breach of contract, so occasioned by the defendant's wrongful act, the plaintiff has been compelled to pay damages to the party with whom he contracted."

4. *PATTEN V. REA.* 2 Com. Bench., N. S., 606.

Respondent Superior—Liability of Master for Damage caused by Negligence of Servant.

The declaration in this action stated that, by the wrongful act, neglect, and default of one William Taylor, then being and acting as defendant's servant, the defendant's horse and carriage were driven against a horse of the plaintiff, which was thereby killed.

It appeared in evidence, that defendant was the proprietor of a repository for the sale of horses at Newington, that Taylor was his manager there, having the general conduct of the business, and having a horse and gig, his own property, kept for him on defendant's premises free of charge, which he (Taylor) was in the habit of using when out on the defendant's business. On the day of the transaction in question, Taylor was going in his gig to see his medical attendant at Finsbury Place, in London, and also for the purpose of getting in a debt owing to the defendant for a horse. Taylor, whilst going to Finsbury Place, negligently caused the damage complained of, and the question was, whether his principal could be made responsible for it, in accordance with the well-known legal maxim, *Respondent superior*? The action was held to lie upon this ground, that looking at all the circumstances, and considering the nature of defendant's business, the servant must be assumed to have had authority to exercise his discretion as to the mode of performing his duty to his master. And there being also evidence to show defendant's knowledge, that his servant was using the horse and gig on the particular occasion, the case was held to fall within the scope of the general rule laid down by Lord Holt in *Turberville v. Stampe*, Lord Raym., 266, that "a master is responsible for all acts done by his servant in the course of his employment, though without particular directions."

5. *EVANS V. WRIGHT.* 2 H. & N. Exch. Rep., 527.

Duty of Landlord distraining for Rent in regard to Surplus Goods.

In this case a landlord distrained, for rent in arrear, furniture which had been previously assigned to plaintiff by indenture as

a security for money advanced. Of this furniture its owner was, under the indenture, allowed to retain possession until default. The distress was put in before default made, but notice of the assignment was given to the defendant, whilst in possession under the distress, as bailiff of the landlord. The rent in arrear not being paid, the furniture was removed to an auction-room and put up for sale, which proceeded until a sufficient sum had been realized thereby to pay the rent and expenses. The sale was then stopped, and the portion of the furniture unsold was returned to its owner, together with the balance of the proceeds. The owner sold the furniture and absconded.

Under the above circumstances the plaintiff (assignee of the furniture under the indenture) sued the defendant (the bailiff of the landlord) in trover, and for money had and received for the plaintiff's use. The action was held not to lie, there being no conversion, nor any violation of his duty by the defendant in handing over the balance remaining, after liquidation of rent and expenses, to the sheriff. "The distress," observed Watson, B., "was perfectly lawful, and under the statute 2 Wm. & M., sess. 1, c. 5, the goods were removed to a convenient place for sale; it turned out that there was an overplus of goods, and thereupon a duty was imposed on the defendant which is not defined either by the common or statute law, or any decided case. Then, what was the defendant to do with the goods? I think that he was bound to return them to the place from whence they came, or put them in some convenient place, giving the owners notice where they might find them." With respect to the count for money had and received, added the same learned judge, "Yates v. Eastwood, 6 Exch., 808, is a distinct authority that, under these circumstances, an action for money had and received will not lie, but the proper remedy is under the statute 2 Wm. & M., sess. 1, c. 5, s. 2.

6. EX PARTE THE GREAT WESTERN RAILWAY COMPANY.
2 H. & N. Exch. Rep., 557.

Certiorari to remove Cause from County Court.

In granting a certiorari to remove a cause from the county court, the claim being for a sum over twenty pounds, the court refused to make it a condition of the rule, that the defendant, if successful, should have no more costs than would have been allowed if the cause had been tried in the county court.

7. BOLTON v. JONES. 2 H. & N. Exch. Rep., 564.

Party to Action for Goods Sold.

In this case the facts were as under :—On the morning of the 13th January, 1857, the plaintiff bought and paid for the stock, fixtures, and business of C, a pipe hose manufacturer. In the afternoon of the same day the defendant sent a written order addressed to C for certain goods, which were supplied by the plaintiff. The plaintiff's book-keeper struck out of the order the name of C, and inserted therein the name of plaintiff. On the invoice being sent in for the goods thus supplied, the defendant refused to pay for them, and a verdict having been found for the plaintiff in an action for their price, the court, on leave reserved, made absolute a rule to enter it for the defendants, it being a rule of law, "that if a person intends to contract with A, B cannot give himself any right under it." And "if a man goes to a shop and makes a contract, intending it to be with one particular person, no other person can convert that into a contract with him."

8. HUDSON v. BAXENDALE. 2 H. & N. Exch. Rep., 575.

Responsibility of Carrier—His Duty when Goods are refused by Consignee.

Two points, the first of which is somewhat novel, called for adjudication in this case. The first question was, What duty is cast upon a carrier in the event of refusal by a consignee to accept goods forwarded to him? The rule recognised by the court as applicable to such circumstances is, that the carrier must conduct himself with reference thereto *as a reasonable man would do*. It cannot be laid down as a positive rule of law, that the carrier is bound to give notice of the consignee's refusal to the consignor, though there may be cases in which this course will be proper.

The second point decided in this case was ruled conformably to the law, as previously well recognised; viz, that a carrier is not responsible for damage done to goods entrusted to him, by reason of some inherent defect therein, or of the negligence of his customer in reference to them. The carrier will consequently not be liable for leakage during the transit of a cask of spirits which had been insufficiently bunged.

9. MASSEY v. BURTON. 2 H. & N. Exch. Rep., 597.

County Court Practice, 19 and 20 Vict., c. 108, s. 18.

A plaintiff may be said to "dwell" within the district of a metropolitan county court, so as to be entitled to avail himself of the above statutory provision, who takes lodgings and goes to reside within such district expressly with a view to bringing himself within that provision, and suing in the county court of that district.

10. TUFF v. WARMAN. 2 Com. Bench, 740.

Plaintiff's Right to recover Damages for an Accident when he himself has contributed thereto by his own Negligence.

In this case, the authority of the oft-quoted "donkey case," as it is called, "*Davies v. Mann*, 10 Exch. 546, and *Dowell v. the General Steam Navigation Company*, 5 Ell. & B., 195, has been confirmed; but one of the learned judges (Mr. J. Williams) feeling some difficulty, and lamenting the unintelligible and unsatisfactory footing of the law in respect to the points discussed, leave to appeal was granted. The learned judge at *Nisi Prius* (Mr. Justice Willes) had told the jury that if, on the collision of two vessels, the negligence or default of the plaintiff was in any degree the direct or proximate cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant; but that, if the negligence of the plaintiff were only *remotely* connected with the accident, then the question was, whether the defendant might, by the exercise of ordinary care, have avoided it, and the court held his direction was right.

The two most important points reserved for appeal are:— That the judge should have told the jury—1. That if the plaintiff by his negligence contributed to the occasioning of the accident, he could not recover whether he contributed directly or indirectly.

2. That even assuming negligence on the defendant's part, the plaintiff could not recover, if he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence.

11. MOOR V. ROBERTS. 2 Com. Bench, 671.

Interrogatories at Common Law—The Limits within which they may be Employed.

In this case, the 51st section of the Procedure Act of 1854 has received a useful commentary. It is not necessary to particularize the interrogatories themselves which were propounded, it is enough to record the principle which the court laid down. The obvious intention of the section in question was, said Cockburn, C. J., "to supersede the necessity of recourse being had in all cases to a court of equity, for the purpose of aiding by discovery the proceedings in an action at common law, and to give the courts of common law power to afford the same sort of assistance there;" so that "when either party has a case, but the materials for proving it are not in his own possession, or under his own control, but in the possession of his adversary, he should be enabled to interrogate his adversary, in order to establish his own case." An attempt by one party, by indirect means in his interrogatory, to obtain a knowledge of what the other side intends to rely on in support of his case, will not be allowed in a court of law.

12. WILBY V. THE WEST CORNWALL RAILWAY COMPANY.
2 H. & N., 703.

Carrier, Liability of—Transmitting Goods through other Carriers.

This case is of considerable value to those interested in transmitting goods by a route where, the railway or other route being broken, they are sent on by other carriers to the place of their destination. On the defendants' cart calling for the goods in question, the carter signed the following paper—"Penzance, delivered to W. C. Ry. (defendants), in good condition, two cases for Mrs. Wilby, Wolverhampton, delivered by W. H. Hodgson for Mrs. Wilby." The cases were addressed to "Mrs. Wilby at Wolverhampton. Glass, with care, per first steamer for Hayle." The defendants carried the cases by the railway to Hayle, one of the stations on their line, and thence delivered them into a steamer to Bristol. There was no damage at the time of this delivery. When the goods were ultimately (after passing through the hands of the steamer and Great Western Railway) delivered to the plaintiff, they were broken and damaged. The question which the court had to decide was, whether there was evidence on which the court could infer an undertaking on the part of the

defendants, as common carriers, to carry from Penzance to Wolverhampton. The case (said Watson, B.), is the same as *Muschamp v. The Lancaster and Preston Railway Company*, and it makes no difference whether the carriage is paid at the beginning or at the end of the journey. But it is said that this case is distinguishable, because for a certain distance the sea intervenes; but all railway companies strive to extend their traffic; and it would be strange if a company who undertook to carry goods from London to Paris, were not liable for a loss at Boulogne, because the line did not extend beyond Dover or Folkestone." There was nothing in the conduct of the parties to shew that the Company were mere agents beyond their line to forward the parcels. It was also held that there is no distinction between carrying by sea, or van, or railway.

13. *VOSE V. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.* 2 H. & N., 728.

Liability for an Accident at Railway Station, in joint Occupation of Two Companies.

The railway station at Liverpool is in the joint occupation of two railway companies, and the rules for the regulation of the station were published in the joint names of these two companies. It was owing to these defective rules that the death of the plaintiff's husband was caused whilst he was shunting some carriages. The deceased was not the servant of defendants, but of the other company. The jury had found that the defendants were guilty of negligence. "In my opinion," said Pollock, C. B., "we ought to be extremely cautious not to relax the rule originally laid down in this court, that, with respect to servants in a common employ, the master cannot be made answerable for an injury caused to one servant by the negligence of another. Few rules of law are of greater practical importance. The law must have been the same long before it was enunciated in this court in the case of *Priestly v. Fowler* (3 M. & W., 1). If not, such actions would have been of frequent occurrence. No such action, however, appears ever to have been brought before the decision of that case. We ought not to allow so important a decision to be frittered away by minute distinctions or the ingenuity of advocates. But that rule of law does not apply to the facts of the present case." And the court refused to disturb the verdict found for the plaintiff.

14. *ROGERS v. TAYLOR*. 2 H. & N., 828.

Undermining Foundation—Right to Vertical and Lateral Support for Messuages.

In the declaration in this case, it was alleged that the plaintiff was in possession of certain messuages, and had a right to the support of foundations thereto, and that defendant worked certain quarries underneath so negligently, that the foundations were weakened and damaged, and the messuages sunk in. It was not necessary to say whether the ownership of the surface of land gives a right to its enjoyment for all reasonable purposes; but Watson, B., made certain remarks on the subject which seem valuable. "The cases," observed the learned judge, "have gone far to shew that there is a distinction between the right to lateral support, and the right to a vertical support by the inferior strata. There is no doubt that every landowner has a right to the support of the land adjoining his own; but when, by building, he has placed an extra weight upon the soil, he can only acquire a right to lateral support for such extra weight, by prescription or grant.—*Wyatt v. Harrison*, 3 B. & Ad., 871, 2 Roll Abs., 564, tit. trespass (I.) pl. 1. But *Smart v. Morton* (5 E. & B., 30), *Humphries v. Brogden* (12 Q. B., 739), and other cases, establish the general right of the owner of the surface to support of the subjacent strata. And it is to be observed that in the judgment of Lord Campbell, in *Humphries v. Brogden*, no allusion is made to any distinction between land in its natural state and land with houses built upon it, so far as such right to vertical support is concerned. However, it is not necessary to decide whether the owner of the surface is entitled to the support of the subjacent strata for buildings put upon it otherwise than by grant or prescription, because here the jury have expressly found that the plaintiff had, for twenty years, uninterrupted use of foundation sufficient to support his house."

The case of *Shaw v. Stenton*, in same volume, a few pages later, establishes the right of lessee of a mine to be protected against the digging of holes *above* his mine and flooding it.

15. MANLEY V. THE ST. HELENS CANAL AND RAILWAY
COMPANY. 2 H. & N., 840.

*Necessary Precautions for preserving Right of Communication on Highway—
Modern Rule on the Subject.*

The husband of the plaintiff had fallen into a canal and had been drowned; and it was alleged that, through the defective contrivance of a swivel bridge, the accident had occurred. It was argued that what was done by this Canal Company was done by them under the authority of an Act of Parliament passed very many years since, and that the responsibility attaching to the company was that attaching to trustees of highway, or other persons acting in the performance of functions intrusted to them by statute. But it was held that the owners of the canal were to be held as a trading company, and are responsible if mischief ensues, from their not doing all they ought, or by acting improperly. By the statutes, the company were permitted in certain cases to make swivel bridges; and they were also required, when this canal crosses a highway, &c., to make a sufficient bridge. Now it may very well be that, eighty or a hundred years ago, when the population and the communication between those places were small, so that there was little occasion to use the highway, a swivel bridge may have been sufficient; but it may not be sufficient now, and the jury have so found. "I cannot help thinking," remarked the Chief Baron, "that in modern times human life is looked on as of greater value than in olden times. There were many precautions against danger with which our ancestors were satisfied, which do not accord with the improved views which are now taken, both by judges and jurymen, respecting the preservation of human life and health. Independently, therefore, of any considerations being drawn from changes in population or commerce, the jury were ever justified in saying, 'Whatever persons a hundred years ago would have thought, we think this bridge not sufficient, for it is such as may cause a man to lose his life, without any fault on his side.'" And the defendant was accordingly held responsible.

Short Notes of New Books.

[*.* All Law Books and works of interest to the Legal Profession, forwarded to the Editor of the *LAW MAGAZINE* and *LAW REVIEW*, will be noticed—either shortly, or at length—in its pages.]

A Concise Treatise on the Principles of Equity Pleading, by C. S. Drewry, Esq., of the Inner Temple, Barrister-at-Law. Butterworths, 1858.

THE work by Mr. Drewry is, as it describes itself, a concise exposition of the Principles and general Rules of Equity Pleading. Such a book, since the recent Reforms effected in that branch of our law, will be found useful to a large class of readers, though it does not pretend to be more than an elementary treatise; as an introduction to pleadings as they now subsist in the Equity Courts, the book is well timed. The author, after having explained what persons are entitled to sue in equity, and in what manner they sue, proceeds to treat very succinctly and clearly of the modes of instituting a suit in equity, of the defence to suits, of pleas, answers, amended bills, of the proceedings in evidence, &c., till we are brought to appeals and the conclusion of the book.

Outlines of Equity—being a Series of Elementary Lectures, delivered at the Request of the Incorporated Law Society. By Freeman Oliver Haynes, of Lincoln's Inn, Barrister-at-Law, and late Fellow of Caius' College, Cambridge. Cambridge: Macmillan & Co., 1858.

ALTHOUGH these lectures by Mr. Haynes were addressed to the audience which, from time to time, meets in the hall of the Law Society, to receive some oral teaching prior to entering on their professional career, we think he has been well advised to publish them for the benefit of another and wider circle of readers. They will be found well adapted to the wants of all students who desire to derive an elementary knowledge of the principles of, and the practice in Courts of Equity. The author expresses a hope, and we will also state our belief, that his work may be useful to university under-graduates who have selected law as a part of their curriculum, and to those educated laymen who merely deem it a fitting thing that they should not be

ignorant of the subjects and business which are embraced by the Courts of Chancery.

Though it is true that much of legal writing must be dry, it need not be made repulsive: elementary works, especially, admit of being made somewhat interesting. Both the style and selection of matter of Mr. Haynes are worthy of great praise. What he has done he has done well; and he who desires a clear and readable account of what is done in our courts of equity, and how it is done; the origin of its jurisdiction; and the nature, character, and system of the tribunal, cannot do better than read Mr. Haynes's little book. What the late William Smith's "Action-at-Law" is to the common law student, Mr. Haynes's book may be to him who requires elementary knowledge of equity. This is no doubt high praise; and we regret that we have not space to justify here our commendation by extracts from the learned author's pages. Although we cannot attempt this, we will venture to borrow for another purpose a paragraph which we commend to the attention of Law Reformers. In speaking of the new system under which the Master's office was abolished, we find the following remarks, as true as they are forcible. "By the recent changes," says the writer, "expedition has been gained; of this there can be no doubt. On the other hand, it is difficult to say that the original intention, that the judges should work their own business in chambers, has been fully carried out. The chief clerks practically have cognizance in the first instance of all matters, however important the law involved may be; and the increasing power of these officials cannot be viewed without feelings of alarm. No doubt it has been stated distinctly on the Bench, that it is the positive right of the suitor to have every matter heard by the judge himself, but something more than this seems to be wanted, if I may presume to say so; namely, a system of conducting the chamber business of the court, which, instead of compelling the suitor to claim the privilege of having his case adjudicated upon by the judge, should, *as of course*, bring before the judge himself the more important description of business. Unless this be accomplished, the relief in getting rid of the delays in the Master's office may, I fear, be seriously counterbalanced by new vital defects; and our late reforms may afford another instance of the difficulty of driving out *one* evil without admitting *another*." The mischief here alluded to, is *great, grievous, and growing*. Are we to wait till it becomes as gross as that of the old Master's office, and then sweep away in a hurry this system also, only to recommence unadvisedly yet another form of it? or, having learnt some wisdom in the mode of reforming, are we ready to apply the remedy in time? The above extract, however, is only an episode, as it were, in the lectures of Mr. Haynes, which we now heartily commend to the perusal of those for whom the volume is intended.

Record and Writ Practice of the Court of Chancery. By Thomas W. Braithwaite, of the Record and Writ Clerk's office. Stevens & Norton, 1858.

THIS appears to be a very useful volume. It is, as its title indicates, a book of practice, and relates to that part of the subject which is not found in such detail in other books of practice. Fourteen years ago a similar work was published by the late Mr. Veal; but the many and great changes which have been effected since 1852, have rendered a new book very desirable. It would appear that a very great increase of the business of the Record and Writ Clerk's office has in recent years taken place. The extent and nature of this augmentation the author has explained in his preface, and are shown also very clearly in the published returns as to the fees. Thus, in the years 1850-1, (the year preceding the changes in the practice which tended so to transform and increase the business of the office,) such fees amounted to the sum of £17,159, 3s.; whereas, in the years 1852-3, they amounted to £25,515 : 6 : 8, and the amount of such fees has in each subsequent year exceeded even the last specified amount. And such an excess with respect to the years 1856-7 is the more remarkable, inasmuch as, during nine months out of twelve of that year, the lower scale of fees of Court was in operation. Such a result can, however, scarcely be expected in future years, when the lower scale of fees of Court will probably be in more active operation—although, of course, such distinction with respect to fees, not only does not reduce, but rather increases the duties connected with the business of the office.

Mr. Braithwaite's book, we repeat, seems both carefully and elaborately edited, and we doubt not will prove of great advantage to those concerned with the practice it treats of.

Events of the Quarter.

MISCELLANEOUS.

BANKRUPT LAW MEASURES.

A VERY able paper (by Mr. W. Hawes), in the Transactions of the National Social Science Association, treats the important subject of the effects of commercial legislation on commercial morality. The main object of Mr. H. is to shew that the bankrupt law proceeds upon an erroneous and mischievous principle, in so far as it releases the insolvent from his liabilities, and from all penalties, for any misconduct how gross soever, by the sentence of the court, and not by the consent of creditors. With many of Mr. H.'s objections to the existing law, it is impossible to find fault. But it would require much more conclusive reasoning than he has advanced to demonstrate, that the change, authorized as the result of the elaborate inquiry of 1842, was entirely wrong, and that we should return to the old practice of making the creditors, and not the judge, decide on certificate. The author is peculiarly unfortunate in his reference to the Insolvent Court as so much more effectual a check upon the debtor than the Bankruptcy Court, inasmuch as its whole proceedings have been ineffectual; the attempt is to visit extravagant or fraudulent debts with condign punishment, when the interposition of creditors is required to put the powers of the court in motion. It is notorious that as soon as the creditors discover, in the course of the insolvent's imprisonment, that there is no chance of a dividend, they do not even oppose his discharge; and thus much more than one-half of those who are arrested are discharged without undergoing the least examination, and these probably the very worst of the whole, because they have either spent their whole substance by reckless extravagance, or made away with it to prevent its being seized, or given it over to some creditor in fraud of the rest. The creditor has in most cases no interest in the debtor's punishment, and the commission in whose report Lord Cottenham introduced the new plan of certificate, to be granted by the court, had abundant evidence of the careless, and often partial and interested manner in which creditors generally acted in granting or refusing certificates. A great alteration was introduced in 1849, that of Class Certificates, which was no part either of Lord Brougham's Act, 1831, or of Lord Cottenham's amendment of that Act in 1842. It was introduced at the earnest desire of the Mercantile Association in London for amending the Law of Debtor and Creditor, and Mr. Hawes was among the most zealous of its advocates. A select committee of the House of Lords, in 1853, fully examined the operation of this plan; and though Lords Brougham and Cranworth (the chancellor) adhered to the plan, which was opposed, if not in whole, yet in a great part by Lord

St. Leonards; and though Mr. Hawes and others of the city men most strenuously persisted in supporting it, yet it may be observed that Lord Brougham has since admitted his opinion to be so far changed, in consequence of the extremely different principles on which the bankruptcy judges act, so as to make the criminal part of the bankrupt law wholly vague and uncertain, and his bankruptcy bill expressly purposes to do away with classification, and to give as a substitute a direct penal jurisdiction to the court. But it also provides, at the suggestion of the Lord Chief Justice (Campbell), the assistance of an official interrogator, to render the proceedings against bankrupts more effectual.

The greatest misapprehension has occurred, and indeed misrepresentation has been made, of these bills; one of them especially, which Lord Brougham introduced, to remove the most glaring defects in the present bankruptcy law administration—the distance of the courts from parts of their districts, and the defective powers of the judges as well as their insufficient numbers. Of these misrepresentations it is necessary to point out the purport; namely, that the proposed transfer of jurisdiction to the county courts would create an expense to the Consolidated Fund of four or five hundred thousand pounds. Nothing can be more erroneous. It is true that a mistake was made in section 10 of the first bill—a mistake as to the salaries of the registrars of the county courts; but it is also true that no one who looked at the *Précis* appended to the bill, could for a moment fail to perceive this, or for an instant imagine there was any intention of saddling the Consolidated Fund with any such burthen; and the second bill, which has a similar *Précis* appended to it, has in addition to this, and in order still further to render the matter more explicit, the following note:—

NOTE.—The immediate relief to the charge on the Bankruptcy Funds will be but small, because, although the bill transfers the salaries of the country commissioners (£18,000) to the Consolidated Fund, and gets rid of the rent of the District Courts, of the travelling expenses of the Commissioners and Registrars, &c., and of compensations to the amount of £2195, it on the other hand abolishes stamp duties to the amount of nearly £17,000, and fees to the amount of £3000, and contemplates an increased payment to the Bank of England. The immediate annual relief to the suitors, however, will be very considerable—will amount to £57,457 : 9 : 7, viz.

	£	s.	d.
Salaries of the 10 country commissioners proposed to be transferred to the Consolidated Fund -	18,000	0	0
Rent of district courts and travelling expenses of Commissioners and Registrars, &c. -	4,535	9	
Amount of compensations now paid to twelve of the County Court Judges, formerly commissioners of bankrupts -	2,195	0	0
Stamp duties abolished -	16,927	0	0
Expense of stamping -	800	0	0
Fees abolished -	3,000	0	0
Solicitors and messengers charges abolished £ -	12,000	0	0
	<u>57,457</u>	<u>9</u>	<u>7</u>

The immediate increase of the charge on the Consolidated Fund, supposing twenty additional county court judges to be required, and supposing payment of compensations to the commissioners and other officers of the Insolvent Debtors Court to the full amount of their present salaries and emoluments, will not exceed £79,800; namely, the salaries of the proposed additional Judges, additional Registrars and Examiners, the proposed increase in the salaries of the present Judges, and such portion of the emoluments of the officers of the Insolvent Debtors Court (£7000) as is now paid by fees; but as this increase will of course be subject to reduction as the compensations cease, the eventual annual increase of charge will only amount to £63,800, a sum which it is estimated the fees in the County Courts, consequent on the extended jurisdiction under section six of the bill, will be more than sufficient to meet.

The claim of the suitors in bankruptcy to relief, either by the transfer of some portion of the judicial salaries to the Consolidated Fund in the manner proposed by this bill, or of the compensations, or of both, is a very strong one. Since the institution of the Court of Bankruptcy in 1832, the suitors have paid upwards of £500,000 in compensations for abolished offices, and they are now paying such compensations to the amount of £20,000 per annum. If these compensations (payable under the 1 & 2 W. IV., c. 56, and 5 & 6 Vict., c. 122), were also transferred to the Consolidated Fund, the per-centages payable out of the gross produce of bankrupts' estates under section 54 of the Bankrupt Law Consolidation Act, 1849, and proposed to be slightly reduced by section 52 of this bill, might immediately be materially lessened, and in a very few years altogether abolished.

But it was announced, at the same time with the introduction of these two bills, that beside the one prepared by the Board of Trade for regulating and facilitating voluntary arrangements, and the measure of the late government, stated by Lord Cranworth to be nearly ready for presentation, there was a more general bill on the whole bankrupt and insolvent law, which has originated in a proposal made at the meeting last autumn of the National Association for the Promotion of Social Science. At that meeting two of the present ministers, Lord Stanley and Sir J. Pakington, presided over the departments of public health and education, and Mr. Addington, with the Recorder of Birmingham, took the Bishop of London's place as president of the department of penal legislation. The present Attorney-General also took an active share in the proceedings of the congress. It may therefore be assumed that the bankruptcy and insolvency measure, which the committee of the commercial towns and bodies, proposed by Lord John Russell as presiding over the department of jurisprudence, are understood to have preferred, will meet with full consideration from the government. It was resolved at the concluding general meeting, that the result of the committee's inquiries should be laid before the attorney-general in the form of a bill; and though Sir F. Kelly did not then fill that office, it is most probable that it will be submitted to him, engaged as he is known to be in framing a measure on the same important subject. All these bills will naturally be referred to select committees, possibly of both Houses, certainly of the Lords, and sanguine hopes may be entertained of a plan resulting from the whole that shall deserve the approbation of the country.

AMONG the events of the quarter, is one of which the interest and the importance is not confined to the legal world—the acquittal of Bernard on a charge of being accessory before the fact to the massacre of the 14th January at Paris. The question of law has been superseded by the verdict upon the fact, else we might state our opinion, that there could be no accessory punishable in England to a fact dispunishable in England, as a murder by foreigners in a foreign country plainly was. But the jury finding the party not guilty, when the point of law was expressly reserved and never could in any way come before them, must be taken to be a finding that the evidence did not prove the prisoner to have in any way counselled, procured, or aided the offence allowed to have been committed. The grounds of their opinion we have no means of knowing. But we do know that the man was concerned in ordering the grenades to be made, and providing materials for the explosive powder, in sending them over to the assassins, in paying money to one of them, and aiding his journey by various helps, and that he had been in correspondence with one of them some time before, receiving letters from him on the very subject of the Emperor's assassination. All this we are told is nothing to the purpose, because the grenades might have been intended to aid some Italian plot, some design to massacre scores of people with a view to killing some Italian tyrant, and of all this not a tittle of evidence is even attempted to be given. So that one marvels how any one can be found guilty of poisoning as long as it is possible to suggest the use of the drug in destroying vermin. No one can accuse those who found the verdict, or those who defend it, of defining assassination in terms. But it may be observed that there are two ways of encouraging assassins; the one an open and honest and manly way—avowing that the end justifies the means, peradventure offering a reward for the act; the other, a somewhat hypocritical course—God forbid we should defend the crime, but we shall take care the criminal escapes.

THE AUTHOR OF BLACKSTONE'S COMMENTARIES.—We understand that an *Elementary Treatise on Architecture*, from the pen of the celebrated commentator on law, Judge Blackstone, and which is alluded to in his life as remaining in manuscript, is now proposed to be printed by subscription, with a dedication to the Lord Chancellor, by his grandson, Mr. Blackstone, late M.P. for Wallingford. The work above alluded to, and which is enriched with numerous illustrative drawings by Blackstone himself, was written before he was twenty years of age. It is in its nature a skilful compilation and adaptation from several authors on Architecture; and it has been thought, by those who have seen the manuscript and are capable of judging of its merits, to justify in every way the assertion of the learned commentator's biographer, who says, "It is esteemed by those who have perused it as in no respect unworthy of his matured judgment and more practised pen." As the noble lord who now fills the highest office of the law has consented to head the list of subscribers, we have little doubt

his example will be followed by other influential members of the legal profession. The work, we have stated, will be published by subscription. The impression will be limited to 500 copies, and it is intended that one guinea shall be the amount of the subscription for a single copy. It will be issued by Messrs. Butterworth, of Fleet Street.

APPOINTMENTS, &c.

The most interesting legal appointments of the quarter, are of course those which have been made in connection with the accession to power of Lord Derby's ministry. Sir Frederic Thesiger, after having been for exactly forty years a popular advocate, has now in the sixty-fourth year of his age reached the Chancellorship, amidst the congratulations of his numerous personal and professional friends and admirers; and has found in the assize town of the romantic and salubrious county of Essex the name which he takes for his title.

The new Attorney-General, Sir Fitzroy Kelly, was called in 1824, and has therefore also served a long apprenticeship to his profession. He has already recommenced his official career by large promises of law reforms.

Sir Hugh McCalmont Cairns, M.P., Q.C., who has been promoted to the post of Solicitor-General, was called to the bar just twenty years after Sir Fitzroy. His rise in his profession has been both rapid and well-merited. We observe also that he has given notice of proposing certain valuable reforms, with the object of giving to the Court of Chancery the power of trying issues of law instead of sending them to courts of law. This is a notable step towards the fusion of the courts of law and equity.

The office of Judge Advocate-General has been filled by John Robert Mowbray, Esq., M.P. for the city of Durham, and of the west circuit.

In Ireland, Mr. Napier has been appointed Lord-Chancellor, James Whiteside, Esq., Attorney-General; and Mr. Inglis is the new Scotch Lord Advocate.

The name of S. B. Toller, Esq., was accidentally omitted in our last number from the list of recently appointed Queen's Counsel.

David Power, Esq., of the Norfolk circuit, has been appointed a Q.C., and was called within the Bar this Easter Term.

COLONIAL APPOINTMENTS.

Mr Adam Bittleston, late of the midland circuit, has been appointed to the recent Indian judgeship. He was called in 1841. Richard J. Corner has accepted the post of the Chief Justiceship of the Supreme Court of Her Majesty's Forts and Settlements on the Gold Coast, and assessor to the native chiefs within the protected territories near or adjacent to the said forts and settlements.

E. B. Watermeyer, Esq., has been nominated as one of the three Puisne Judges of the Supreme Court of the Colony of the Cape of Good Hope; Mr. H. J. Woodcock as the Attorney-General for the island of Antigua.

Alexander Fitz-James, Esq., has been appointed to be Queen's Advocate and Police Magistrate for the Colony of Sierra Leone; Henry James Stonor to be Chief Commissioner, and Sir Frederick Rogers Assistant Commissioner, for the sale of Encumbered Estates in the West Indies, (under the statute passed in 17 & 18 Vict.)

The Queen has been pleased to grant to Robert Pipon Maret, Esq., the office and place of Advocate-General of the Island of Jersey, in the room of John Hammond, appointed Bailiff of that island.

NECROLOGY.

February.

- 12th. STONEMAN, R. C., Esq., Barrister-at-law, of London, Upper Canada, aged 26.
- 12th. WILSON, Mr. Justice, late Chief Justice of the Mauritius, aged 73.
- 19th. PEMBERTON, Richard, Esq., solicitor, aged 61.
- 24th. MAUGHAM, C. W., Esq., B.A. of Danes' Inn.
- 27th. FOSTER, William, Esq., solicitor of Sleaford, aged 66.
- 27th. BANKES, Langley L., Esq., solicitor, aged 56.

March.

- 1st. YOUNGE, Edward, Esq., of the Middle Temple, Barrister-at-law, aged 64.
- 2nd. WOOD, John, Esq., solicitor, aged 63.
- 3rd. DUCIE, W. S., Esq., solicitor, aged 78.
- 5th. HOOPER, Nathaniel, Esq., late of the Temple, aged 65.
- 15th. MORRIS, T. F., Esq., solicitor.
- 17th. SHINDLER, R., Esq., solicitor.
- 17th. STONE, John, Esq., solicitor, aged 85.
- 19th. PEMBERTON, Richard, Esq., solicitor, aged 61.
- 24th. SELBY, Gerrard, Esq., aged 42.
- 24th. CARROLL, F. J., Esq., solicitor.
- 25th. PRATT, Forster John, Esq., solicitor.
- 29th. KING, Henry, Esq., solicitor, aged 38.

April.

- 1st. ELLIOTT, John, Esq., solicitor, aged 57.
4th. KELLY, William Gordon, Esq., Barrister-at-law, and late Recorder of Colchester, aged 72.
10th. ADDISON, Joseph, Esq., Barrister-at-law, and Benchet of the Inner Temple. He had very recently, although not a Q.C., been elected to the Bench. The unexpected death of this eminent lawyer has caused very general and great regret both in and out of the profession.
12th. THOMAS, Frederick, Esq., solicitor, aged 64.
15th. MASON, H. J. Monck, Esq., LL.D. Barrister-at-law, aged 79.
18th. HANDYSIDE, The Hon. Lord, one of the Senators of the College of Justice, aged 59.
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List of New Publications.

Archbold—The Law relating and Notices of Appeal against Poor Rates, Borough Rates, in Appeals under the Nuisance Removal Act, Health of Towns Act, Metropolitan Management Act, and the Watching and Lighting Act, &c. &c. By J. F. Archbold Esq., Barrister. Second Edition. 12mo, 10s. cloth.

Bigg—The Statute Book for England ; being a Collection of Public Statutes relating to the General Law of England, passed in the 17th Parliament of Victoria, Session 1, 1857. Edited, under a New and Original Plan of Arrangement, by J. Bigg, Parliamentary Agent. Post 8vo, 7s. cloth.

Brandt—A Treatise on the Law, Practice, and Procedure, of Divorce and Matrimonial Causes in England, under the Act 20 & 21 Vict., c. 85, containing the Act ; also the Rules, Orders, and Forms issued thereunder, together with Precedents. By W. Brandt, Esq., Barrister. 7s. 6d. boards.

Chitty—Chitty's Archbold's Practice of the Court of Queen's Bench in Personal Actions and Ejectment ; including the Common Pleas and Exchequer. The Tenth Edition, by S. Prentice Esq., Barrister. 2 vols. royal 12mo, £2, 10s. cloth.

Chitty—Forms of Practical Proceedings in the Court of Queen's Bench, Common Pleas, and Exchequer, with Notes and Observations thereon. By T. Chitty, Esq., Barrister. The Eighth Edition. Royal 12mo, 30s. cloth.

Greenwood—A Manual of the Practice of Conveyancing, shewing the Present Practice relating to the Daily Routine of Conveyancing in Solicitors' Offices ; to which are added Concise Common Forms and Precedents in Conveyancing, Conditions of Sale, Assurances, &c. By G. W. Greenwood. Second Edition. 10s. 6d. cloth.

Haynes—Outlines of Equity ; being a Series of Elementary Lectures delivered at the Request of the Incorporated Law Society. By F. O. Haynes, Esq., Barrister. Post 8vo, 10s. cloth.

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THE
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No. X.

ART. I.—CIVIC OFFICES—THE GRESHAM LAW
LECTURESHIP.

SINISTER reports respecting the probable appointment to the Gresham Law Lectureship having been prevalent in legal circles, we rejoice in being able to announce that they are falsified by the event, and care not accordingly to inquire whether there was a tittle of foundation for them or not.

It is, we presume, pretty generally known, that the Gresham Law Lectureship, recently held by a worthy and really learned member of the bar, has long since degenerated into a mere sinecure; the emoluments of the office, amounting to £100 or thereabouts, and the duty attached thereto, involving the delivery of some three or four lectures *per annum*. Now, had it been intended that the office of Gresham Law Lecturer should remain a sinecure, much, doubtless, might have been urged in favour of the pretensions of Mr. A. or Mr. B. (candidates alike unknown to fame), which would have satisfied the conscience of an elector pledged, or coerced through civic influences, to vote for him. For, if there be *nothing* to be done, in consideration of a moderate yet sufficient stipend, how matters it whether A. or B. be called upon to do it? It is precisely, however, because

we understand that the office in question is not meant much longer to remain a sinecure, that we are induced to offer our congratulations to the Mercers' Company, that they have so admirably exercised their franchise in this matter.

From amongst many applicants for the office in question, belonging to either branch of the profession, five candidates (with whose names we have been made acquainted) were selected as *digniores*; and of these five the choice fell upon the present learned and accomplished professor of laws in the University of Cambridge, as being in the opinion of the court *dignissimus*. Dr. Abdy, accordingly, is now installed as Gresham Law Lecturer; and this fact alone satisfactorily guarantees our assertion, that the lectureship will no longer remain a sinecure. It might be made instrumental in effecting much good, as we shall briefly attempt to shew.

It is, we believe, now conceded, that the success of the experiment instituted by the Benchers of our Inns of Courts in reviving, in those ancient legal seminaries, a system of education for the bar, must be tested by reference to the three great practical departments of equity, common law, and conveyancing, which they have founded, and which for the time they endow. Much might be said as to the expediency of inviting to the study of the Roman law those who with difficulty can master, in the allotted time, the elementary doctrines of our own; and somewhat might doubtless likewise be urged against the desirableness of instilling, by means of lectures and class instruction, a knowledge of English history, which such, at all events, as have passed through a university, or even a moderately sound academical, curriculum, might be presumed to know.¹ None, however, can doubt that the common law of England—the doctrines of equity and the principles of real property—must specially demand attention from the student, and form the staple materials of lectures.

To the lectures in these departments, delivered at the Inns of Court, the public generally, and not exclusively students

¹ The readers of this Magazine are well aware that we have always advocated the delivery of lectures on the Roman law and on history, as necessary to a complete system of legal education.—*Ed. L. M. & R.*

entered at those Inns, might, we think, advantageously be admitted. Few possibly would avail themselves of this privilege, which, according to our view, should be attainable on payment of a trifling fee, applicable in such manner as by the governing bodies of our legal colleges might be determined. In offering this facility for instruction in the rudiments of law, would our Inns of Court, however, best discharge their duty; neither could prejudice to any one accrue from it; and the maxim that "every man is bound to know the law," might, after the lapse, as we opine, of but a few years, be truthful as well as trite.

Towards carrying out the idea above developed, the Civic Professorship of Law may easily be made ancillary. We trust that the learned Professor will apply himself to the teaching of commercial law and the common law of England, as actually in force and administered at the present day—that he will be the exponent of principles now recognised by our Courts, and illustrated by our text-writers. He will thus aid, he may do so powerfully and efficiently, in spreading broad-cast amongst the people a knowledge of those statutes and that customary code which they are peremptorily presumed to know, and may perchance be punished for infringing.

Let us say at once then, and without reserve, that the newly appointed Gresham Law Professor will do well to abstain from expounding, in the City of London, those principles of jurisprudence and of the civil law, which, to students at the University of Cambridge, he most successfully explains. Our Law Merchant, based, as it mainly is, on the decisions of Lord Mansfield, and by that great lawyer reduced from a state of chaos into consistency and shape, offers a noble theme for amplification. On such a subject, a Professor of acknowledged reputation, speaking with emphasis and authority, would we think, in this great emporium of commerce, and centre of the world's traffic, collect about him large audiences, and command attention and respect. If this be so, much will be done in aid of the system organized by the Inns of Court. Let the lectures delivered on legal science at Lincoln's Inn, at Gray's Inn, and at the Temple, be made available for either branch of the profession—and why not for the public also? Let a brother professor,

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realizing the anticipations of the munificent merchant who founded his endowment, expound, for the benefit especially of the trading community, those laws and customs under which, wisely moulded and adapted in reference to the exigencies of the day, our trade has so mightily thriven, and our commercial enterprise has penetrated to the ultimate recesses of the globe.

Thus, as we conceive, and only thus, may our English law schools be made fully and efficiently to answer the expectations (as yet but imperfectly fulfilled) of those who planned and have maintained them. Thus, and only thus, may the largest possible amount of practically useful knowledge, bearing on law and legal science, be speedily disseminated throughout the land.

To the learned gentleman, who, as we trust, will be instrumental in conducing to the important ends above hinted at, we tender in sincerity the expression of our hope, that the appointment just conferred on him may lead to his acquisition of yet higher civic honours, and eventually introduce him to a yet wider sphere of usefulness.

ART. II.—ON METHODS OF SELF-EDUCATION,

*Recommended or Adopted by some Lawyers of the last Two Centuries.**

AN inquiry as to the plans of self-education among modern lawyers, in contrast with the collegiate education of a former age, may not improperly begin with the middle part of the seventeenth century.

Lord Keeper Guildford, according to his brother and biographer, Roger North, "used constantly the commons in the hall at noons and nights, and fell into the way of putting cases (as they call it), which much improved him; and he was very good at it, being of a ready apprehension, a nice distinguisher, and prompt speaker. He used to say that no man could be a good lawyer that was not a good put-case."

* The principal part of this paper was read before the Juridical Society.

Roger North, however, himself commences his little discourse on the study of the laws by declaring, that "Of all the professions in the world that pretend to book learning, none is so destitute of institution as that of the Common Law." And from his time downward, students in the Inns of Court have been pretty much left to the guidance of their own intelligence, with the help of private tuition, and of such published works as have from time to time appeared, without the authority of any recognised board of instructors. The exception to this statement is to be found in the institution of law lectures and classes, and periodical examinations; but this, as a continued and connected plan, is a recent one. During the period of about two hundred years, in which an allowed independence was customary, some of the most eminent of our judges and lawyers have grown up; and it is scarcely an idle curiosity that would search for the schemes of study which they may have adopted or formed, in the belief that these would furnish hints of which modern students might make some good use. An early notice of this sort is to be found in Sir Matthew Hale's preface to Rolle's *Abridgment*, where he mentions of the author, that, "from his first admission to the society of the Inner Temple, which was 1st February, 6 Jac., and till his call to be a sergeant, he had contemporaries of the same society of great parts, learning, and eminence; as, viz., Sir Edward Littleton, afterwards Chief-Justice of the Common Pleas, and Lord Keeper of the Great Seal of England; Sir Edward Herbert, afterwards Attorney-General; Sir Thomas Gardyner, afterwards Recorder of London; and that treasury of all kind of learning, Mr. John Selden. With these he kept a long, constant, and familiar converse and acquaintance, and thereby greatly improved both his own learning and theirs, especially in the common law, which he principally intended; for it was the constant and almost daily course, for many years together, of these great traders in learning, to bring in their several acquests therein, as it were, into a common stock by mutual communication, whereby each of them became in a great measure the participant and common possessor of the others' learning and knowledge." This plan of association in study deserves particular notice, and not the less so because it is a natural effect of the modern system of private tuition to give rise to occasional talk on

legal topics in the pupil-room, which may be supposed to be a substitute for it. But even, when other circumstances are favourable, there is likely to be too large a proportion of attention to drawing, to allow free scope for a well-weighed system of mutual discussion on leading topics. Arrangement and selection are principal advantages of such a plan. But the influx and order of the tutor's papers are not at the pupil's discretion, and these would have to be taken when they came. Is it not therefore of material consequence that law students, with any high aims, should find congenial companions beyond the limits of the pupil-room, and concert with them schemes of reading, cross-questioning, analysing, and discussing, which may be made preparatory and supplemental to the usual routine of work? If any farther sanction were needed for such an idea, I would refer to the instance of Sir S. Romilly. He writes thus of himself and his friend, Mr. Baynes:—"We prosecuted our studies together; we communicated to each other, and compared the notes which we took during our attendance in the courts. We used to meet at night at each other's chambers, to read some of the classics, particularly Tacitus, in whom we both took great delight; and we formed a little society, to which we admitted only two other persons, Holroyd and Christian, for arguing points of law upon questions which we suggested in turn. One argued on each side as counsel, the other two acted the part of judges, and were obliged to give at length the reasons of their decisions; an exercise which was, certainly, very useful to us all." Of such a system of companionship Roger North wrote thus—"I will be bold to say that they shall improve one another by discourse, as much as all their other study without it could improve them. There are many reasons," he says, "that demonstrate the use of society in the study of the law. 1st, Regulating mistakes. Oftentimes a man shall read, and go away with a sense clean contrary to the book, and he shall be as confident as if he were in the right; this his companion shall observe, and, sending him to the book, rectify his mistake. 2nd, Confirming what he has read; for that which was confused in the memory, by rehearsing will clear up and become distinct, and so more thoroughly understood and remembered. 3rd, Aptness to

speak. For a man may be possessed of a bookcase, and think he has it *ad-unguem* throughout, and when he offers at it shall find himself at a loss, and his words will not lie right and be proper, or perhaps too many, and his expression confused; when he has once talked his case over, and his company have tossed it a little to and fro, then he shall utter it more readily, with fewer words and much more force. Lastly, The example of others, and learning from them many things which would not have been otherwise known. In fine, the advantages of a fit society are to a student superior to all others put together, and I shall not go about to make a complete catalogue of them." The little book of Roger North's, from which quotations have been given, is worth reading for the value of its suggestions, as well as curious through its quaintness.¹ And it may be of some interest to give a short sketch of the plan of legal self-education which he recommends. The directly legal part of education he treats of under the heads of reading, common-placing, conversing, and reporting. For reading or study, he recommends the text of Littleton's *Tenures*, without comment, and notices also Perkins's *Profitable Book*. Here he digresses to argue in favour of attention to law French, on grounds not wholly applicable now; and recommends the old book, *Terms of the Law*. For a somewhat later stage he advises the student to have more than a single book in reading at a time, and to have some as subsidiary to lighten the labour of the more difficult. For such an use, he mentions a work on Old Tenures, *Doctor and Student*, and Fortescue *De Laudibus Legum Angliæ*, together with some accounts of ancient law in Latin, by Mr. Selden. For more serious reading, after Littleton he advises Plowden's *Commentaries*, and, to be taken along with these, Fitzherbert's *Natura Brevium*, Crompton's *Jurisdiction of Courts*, and Staunford's *Pleas of the Crown*, with the book at the end, *De Prerogativa Regis*, and Manwood's *Forest Law*. But with the treatises there should be something in the nature of precedents. "It is useful," he

¹ A Discourse on the Study of the Laws, by the Hon. Roger North, published in 1824, and stated to have been then first printed from the original MS. in the Hargrave collection. With notes and illustrations, by a member of the Inner Temple,

says, "to have near at hand the *Registrum Brevium*, because many processes are there not in the *Natura*, and no information or description can be so well to explain a process as the form itself; and for the same reason it is good to have within reach some of the books of entries, as Rastal, Coke, &c.; for if you would understand what counts, bars, pleas, replications, demurrers, and joining issues, and the like are, there you may read the form of them, which speaks all that is to be known of them." As to the Year-Books, he does not recommend an attempt to master them in mass, as being an undertaking too studious for the age, and indeed as not suitable to so early a period of study; but that, after Plowden, the student should take in hand the Year-Book that is called Hen. VII, which, he says, "is accounted the most explicit in expression and matter, and very many of the chief law matters now evidently known were considered, debated, and resolved there; and it gives an idea of the manner of practice and expression of the law in that time, and enables a student to read the other books of the Annals, or to understand them, if he has occasion to consult, or peruse any cases referred to there." Together with this, he recommends, as rather lighter reading, some of Lord Coke's institutionary pieces, as his *Pleas of the Crown*, *Jurisdiction of Courts*, and *Comments upon Magna Charta* and the old statutes. And, when this is done, he advises to enter upon some of what were then the more modern Reports. I will not follow farther his directions as to books, except to say that he refers to Coke's *Reports*, but includes the *Commentary* upon Littleton in the censure which he passes on those law books which he regards as common-place books made ready to hand. It is, however, on account of this quality that he objects to them; for the diligent construction of a common-place book by the student himself, he treats as an important branch of his education, and reasons in favour of this ancient mode of learning with considerable force. "It will often happen," he says, "that a man shall hear a question of law stated, and remember that he has read some case or other very apposite to, if not the very question in point resolved, somewhere in the books, and if he would give all he is worth, he cannot recover where it is to be found." Common-placing is the remedy according to North. "Now he

that common-places along with his reading, runs straight to his book, and, knowing the method, probably at first finds it out. But if it be a matter that may with equal propriety fall under several titles, then he has two or more to look over, and perhaps divers, and not hit on the right. This is not loss but gain of time, for the very perusing the common-place book, and the many entries there which will be taken notice of, besides what is searched for there, will refresh the memory in divers other points that are not in his inquisition; for these entries, being his own, bring to his mind the case at large, the book, and many other circumstances that occurred in his reading, beside what was noted, and hath an unthought of virtue in improving, or at least retaining in, or, it may be, recovering in what one has once read; and in regard that judgment grows with study, and more with experience, it is of more use to recover a case to the memory when the judgment is ripe to esteem and value it, than it was at first to read and set it down. Now this advantage is not had from perusing indexes, common-places, or abridgments of others; for there no more is known than what falls under the eye, and that, perhaps, so short and imperfect that it breeds in the mind rather confusion than the distinction and information of Law." The good sense of these remarks is clear, and they are not become unserviceable through the changes in the law, however much the practice of common-placing may have fallen into disuse. North's next expedient, "conversing," has already been noticed. Another which he mentions is reporting—the student's making his own notes in court of the material points in cases, first in a rough note-book, and afterwards in one more carefully kept.

Some advice on the study of the law, given by a person of much more authority than North, is to be found in Sir M. Hale's preface to Rolle's *Abridgment*, republished in the *Collectanea Juridica*, and already referred to. He enforces the importance of method as essential to retaining what is read, and gives an outline of a course of study, which, as coming from so great a man, I will repeat in his own words:—"First, it is convenient for a student to spend about two or three years in the diligent reading of Littleton, Perkins, *Doctor and Student*, Fitzherbert's *Natura Brevium*, and especially my Lord Coke's *Commentaries*, and

possibly his *Reports*; this will fit him for exercise, and enable him to improve himself by conversation and discourse with others, and enable him profitably to attend the courts of Westminster. After two or three years so spent, let him get him a large common-place book, divide it into alphabetical titles, which he may easily gather up, by observing the titles of Brook's *Abridgment*, and some tables of law-books; and possibly (as shall be shown) this book now published" (viz, Rolle's *Abridgment*) "may be the basis of his common-place book. Afterwards it might be fit to begin to read the Year-Books, and because many of the elder Year-Books are filled with law not so much now in use, he may single out for his ordinary constant reading such as are most useful, as the last part of E. III., the book of assizes, the second part of H. VI., E. IV., H. VII., and so come down in order and succession of time to the latter law, viz, Plowden, Dyer, Coke's reports the second time, and those other reports lately printed. As he reads, it is fit to compare case with case, and to compare the pleadings of cases with the books of entries, especially Rastal's, which is the best, especially in relation to the year-books. What he reads in the course of his reading, let him enter the abstract or substance thereof, especially of cases or points resolved into his common-place book, under their proper titles; and if one case falls aptly under several titles, and it can be conveniently broken, let him enter each part under its proper title; if it cannot be well broken, let him enter the abstract of the entire case under the title most proper for it, and make references from the other titles unto it. It is true, a student will waste much paper this way, and possibly in two or three years will see many errors and impertinencies in what he hath formerly done, and much irregularity and disorder in the disposing of his matter under improper heads. But he will have these infallible advantages attending this course: 1. In process of time he will be more perfect and dexterous in this business. 2. Those first imperfect and disordered essays will, by frequent returns upon them, be intelligible, at least to himself, and refresh his memory. 3. He will by this means keep together under apt titles whatsoever he hath read. 4. By often returning upon every title, as occasion of search or new insertions require, he will strangely revive and imprint in his memory what he hath formerly

read. 5. He will be able at one view to see the substance of whatsoever he hath read concerning any one subject, without turning to every book (only when he hath particular occasion of advice or argument, then it will be necessary to look upon that book at large which he finds useful to his purpose). 6. He will be able upon any occasion suddenly to find any thing he hath read, without recouring to tables or other repertories, which are oftentimes short, and give a lame account of the subject sought for."

Of the scheme for studying the law, of which the above quotation forms a large part, Sir Thomas Reeve, who was Chief Justice of the Common Pleas in the reign of George II., writes that it was the best extant. He himself gives some advice to a nephew, and bids him begin with a cursory reading of Wood's *Institutes*, "with an intent to understand only the general divisions of the law, and obtain the precise ideas used in it;" and, as a further means for the same object, recommends the *Termes de la Ley* and Jacob's *Dictionary* (with a caution, however, against too much reliance on the latter), and gives directions as to some further help for the understanding of Wood's chapter of conveyances. Then he comes to Littleton. "This done," he says, "read Littleton's *Tenures*, without notes; consider it well, abridge such parts of it as the other books inform you is law at this day. Thus armed, venture upon Coke's comment or institute upon Littleton's *Tenures*, which being well understood the whole is conquered, and without which a common sound lawyer can never be made." He gives advice as to the manner of mastering Coke, and recommends after it a second careful review of Wood's *Institutes*, with an intent to digest the several heads of the law for the use of memory; and a perusal of the more useful statutes at large, in the order in which Wood quotes them, and an examination of the reports for the proof of his opinion. He refers to the preface to Rolle among books to be brought in for variety during the second stage of study, "as *Doctor and Student*, Noy's *Maxims*, Curson's *Office of Executors*, Hale's *History of the Common Law*, principally, with Finch's *Law* and Rolle's *Abridgment* in the preface; in which last you will find the best scheme for studying the law now extant. It will about this time, and not much

sooner, be proper to give diligent attendance on the courts at Westminster, and to begin orderly reading the several reports, which must be read and common-placed in such manner as (by the experience which by this time you will have of the nature of the study) you will be best able to advise yourself." In these three schemes (Roger North's, Lord Hale's, and Chief Justice Reeve's) there is enough agreement to add to the weight of each. One of the most striking variations is North's censure of Coke upon Littleton, on the ground, which certainly seems reasonable, that a ready made comment on another work is a bad kind of book for instruction. "It is the confusion of a student," he says, "and breeds more disorder in his brain than any other book can, that is not a mere index and abridgment; for this Commentary, so called, is only a common-place book exhausted, and the titles disposed after the alphabetical order, into that as may follow the text of Littleton, and bating the small application to the text, more often impertinent than otherwise. The subject-matter is extract of controversial law, which a student ought to gather for himself; for he will never thoroughly understand it, at least not retain it in his mind, when it is of another's gathering. No one ever learnt a language by reading of a dictionary, so no man can be a lawyer by reading Indexes, Abridgments, and Common-places, such as this upon Littleton is."

Notwithstanding these objections, however, the fact is unmistakeable that lawyers of former times set a surpassing value upon Coke upon Littleton. It is not only Sir Thomas Reeve's opinion, and Sir Matthew Hale's expression, "especially my Lord Coke's commentaries;" the eulogies and practice of other lawyers might be cited to the same purpose. An opinion of Mr. Butler's is recorded, that he had never yet met with a person thoroughly conversant with the law of real property, who did not think with him that he was the best lawyer, and would best succeed in his profession, who best understood Coke upon Littleton. And a saying of Chief-Justice Wilmot is mentioned: "I know from experience, that the doses I took of Lord Coke about forty years ago, operate to this day." Those who are familiar with the current opinion of good lawyers half a century since,

will perhaps bear witness to an esteem of the commentary which many persons would now think extravagant.

There are other questions as to which these three plans vary ; but with some differences there is a considerable general agreement. Lord Hale and North both recommend Littleton's *Tenures* ; Perkins's *Doctor and Student* ; Fitzherbert's *Natura Brevium* ; Coke's *Reports* ; the *Year-Book* mentioned as *Henry VII.* ; Plowden, Dyer, and Rastal's *Entries*.

Sir Thomas Reeve mentions Littleton and the *Doctor and Student*, and might have mentioned some of the others if he had given more of a list in detail than he did. But a point upon which they especially agree is the importance which they attach to the now often neglected habit of common-placing. This advice acquires additional weight from the example of the most eminent of the three. His biographer, Bishop Burnet, tells us that he made "divers collections out of the books he had read, and, mixing them with his own observations, digested them into a common-place book ; which he did with so much industry and judgment, that an eminent judge of the King's Bench borrowed it of him when he was Lord Chief Baron. He unwillingly lent it, because it had been written by him before he was called to the bar, and had never been thoroughly revised by him since that time ; only what alterations had been made in the law by subsequent statutes and judgments, were added by him as they had happened ; but the judge having perused it, said, that though it was composed by him so early, he did not think any lawyer in England could do it better, except he himself would again set about it."

Perhaps the chief value of Sir Thomas Reeve's advice lies not in the books, but in the general method which he recommends. He sums it up thus :—"My whole scheme, without naming many books, is no more than this :—

"First, Obtain precise ideas of the terms and general meaning of the law.

"Secondly, Learn the general reason whereupon the law is founded.

"Thirdly, From some authentic system, collect the great lead-

ing points of the law, in their natural order, as the first heads and divisions of your future inquiry.

"Fourthly, Collect the several particular points, and range them under their generals as they occur, and as you find you can best digest them.

"And whereas law must be considered in a twofold respect :—

"I. As a rule of action ;

"II. As the art of procuring redress when this rule is violated, the study in each of them may be easily regulated by the foregoing method ; and the books so recommended will so carry on the joint work, that with this course, so finished, the student may pursue each branch of either to its utmost extent, or return to his centre of general knowledge without confusion, which is the only way of rendering things easy for the memory."

To turn now, from courses recommended, to courses pursued, and from the special mode of studying English law, to the auxiliary studies which eminent lawyers have taken as introductory or collateral. Here two instances occur as among the most obvious and common—History and the Roman Civil Law. As to the latter of these, we read of Sir Matthew Hale, that "he set himself much to the study of the Roman law ; and though he liked the way of judicature in England by juries much better than that of the civil law, where so much was trusted to the judge, yet he often said, that the true grounds and reasons of law were so well delivered in the digests, that a man could never understand law as a science so well as by seeking it there ; and therefore lamented much that it was so little studied in England."

There will be occasion to refer again to this subject. As to history, Bishop Burnet does not say much, but the little which he says is characteristic. After speaking of some of Lord Hale's more general studies, he says—"To this he added great searches into ancient history, and particularly into the roughest and least delightful part of it, chronology."

I do not know what proportion his historical studies bore to those memorable inquiries into other branches of knowledge (particularly scientific), which mark the versatile and unwearied

energy of this great man's mind—a mind continually influenced by a sense of duty, as well as by the love of knowledge.

On this subject of history, Lord Somers may be taken as a leading example. Going to Oxford at a maturer age than was or is usual, he did not leave the University finally for about seven years. He was called to the bar, however, almost as soon as he entered Oxford, and began to practise on his removal to London. The nature of his publications indicates that his studies were directed to constitutional history. These publications began, it seems, with an election case (that of Mr. Denzil Onslow), "wherein is much good matter and direction touching the due ordering of elections for parliament." Afterwards came "A brief History of the Succession, collected out of the records and the most authentic historians, written for the satisfaction of the Earl of H——;" the second edition of which appears to have been published about six years after Mr. Somers's removal to London. At another time was published, "The Security of Englishmen's Lives; or, the Trust, Power, and Duty of the Grand Juries of England, explained according to the Fundamentals of the English Government, and the Declaration of the same made in Parliament, by many Statutes published for the Prevention of Popish Designs against the Lives of many Protestant Lords and Commons, who stand firm to the Religion and ancient Government of England." These publications, directly connected as they are with the political struggles of the time, are also memorable as showing the sort of legal education which this distinguished man had acquired; becoming eminent in constitutional learning while yet comparatively a junior in his profession.

His place as one of the counsel on the trial of the Bishops, appears attributable in part to his learning and knowledge of the records. And this trial also took place about six years after his removal to London.

A degree of resemblance between the early courses of Lord Somers and Mr. Justice Blackstone makes it not unnatural to refer here to the latter, although considerably later in point of time. Blackstone's long residence at the University was connected with want of success at first in his professional life in London. He retired to his fellowship at Oxford, with the design of

practising as a provincial counsel, and delivered private lectures on the laws of England. Some occasional productions of his pen appeared before his great work came out.

But it was when, as Vinerian Professor, he delivered the lectures of which the commentaries are stated by their author to be the substance, that his success became more assured. I cite his case as one showing how well the enforced leisure and study of his University retirement from practice availed him afterwards.

Chief Justice Wilmot is another instance of a scholarly and learned study of the profession. He was (it is said in the memoir by his son) not only accomplished in the laws of his own country, but was also well versed in the civil law, which he studied at Trinity Hall, Cambridge, and frequently affirmed that he had derived great advantage from it in the course of his profession. "He was a general scholar, but particularly conversant with those branches which had a near connection with his legal pursuits, such as history and antiquities. He was one of the original fellows of the Society of Antiquaries when first incorporated in 1750, and frequently attended their meetings, both before and after his retirement; most of his leisure hours were spent in the above researches."

A happy illustration of the method and objects with which a law student may approach the subject of general history, is given in two letters attributed to Lord Mansfield, written perhaps (though I scarcely think it is shown to have been so) about the time of his call to the bar. It is stated that he took his M.A. degree at Oxford in June 1730, and left the University soon afterwards for foreign travel, and that he was called to the bar in Michaelmas term of that year.

The letters referred to were written to a young nobleman, and mark out for him courses of study in ancient and modern history. They do not profess to be plans for a lengthened and painstaking inquiry into these subjects. But, to one who remembers the occasion of them, they bear traces of a disposition for patient research, combined with a lively and comprehensive examination of the subjects considered, which make them valuable as examples of a masterly idea of study, as contrasted with that of a mere reader.

One or two short extracts will give a notion of his methoda.

"The best and most profitable manner of studying modern history appears to me to be this : first, to take a succinct view of the whole, and get a general idea of the several states of Europe, with their rise, progress, principal revolutions, connections, and interests ; and when you have once got this general knowledge, then to descend to particulars, and study the periods which most deserve closer examination. The best way of getting this general knowledge is by reading the history of one or two of the principal states of Europe, and taking that of the less states occasionally as you go along, so far as it happens to be connected with the history of those leading powers, which you will naturally make your principal object, and consider the other as only *accessoriæ*." "I would advise you, when you have read in Henault the reign of any king, to read his character in *Meserai* ; for though nothing is less to be depended upon than such ideal characters, yet they are not entirely without their use ; they are at least helps to the memory, and leave upon the mind pretty much the same sort of impression that is made by seeing the pictures of eminent men ; when we have examined any such picture, no matter whether like or not, we grow, as it were, better acquainted with the original, and form to ourselves an idea of his person, which helps to fix in our memory whatever we hear or read about him."

To any one who should doubt whether a comprehensive cultivation of general literature is suitable to a lawyer, Sir Samuel Romilly's case may be mentioned as an eminent example of such a course. The account of his studies would be difficult of belief if coming from an unknown source ; but we have his own testimony as a warrant for its truth. In early life he read, without system or object, such books as fell in his way, and such as his father's library afforded, and such as several circulating libraries to which he subscribed in succession could supply. Ancient history, English poetry, and works of criticism, were favourite subjects ; but poetry began to predominate over them all. Finding that he had some skill in English verse composition, he practised it for a time, but speaks with satisfaction of his afterwards relinquishing it. He applied himself to the study of Latin, and mentions that, in the course of three or four years, he had read

every prose writer of the ages of pure Latinity, except those who have merely treated of technical subjects, such as Varro, Columella, and Celsus. He had gone three times through the whole of Livy, Sallust, and Tacitus; had read all Cicero, with the exception, he believed, only of his Academic Questions, and his treatises *De Finibus* and *De Divinatione*. He had studied the most celebrated of his orations, his Lælius, his Cato Major, his treatise *De Oratore*, and his Letters; and had translated a great part of them. Terence, Virgil, Horace, Ovid, Juvenal, he had read again and again. Renouncing the hope of reading the Greek writers in the original, he yet went, he writes, through the most considerable of the Greek historians, orators, and philosophers, in the Latin versions, which generally accompany the original text. Travels he mentions as having been among his favourite subjects; and, as he seldom read either travels or history without maps before him, he had acquired a tolerable stock of geographical knowledge. He had read too a good deal of natural history, and had attended several courses of lectures on natural philosophy. To this may be added such a pleasure in pictures, and attention to them, that he tells us he knew the peculiar style of almost every master. Farther on in the memoir, he mentions his idea of becoming an author, and the methods he took to fit himself for this; how he began to exercise himself in prose compositions; and, judging translations to be the most useful exercise for forming a style, rendered into English the finest models of writing that the Latin language afforded; almost all the speeches in Livy, very copious extracts from Tacitus, the whole of Sallust, and many of the finest passages in Cicero; and read and studied the best English writers, Addison, Swift, Bolingbroke, Robertson, and Hume, noting down every peculiar propriety and happiness of expression which he met with, and which he was conscious that he should not have used himself.

After his entrance at Gray's Inn, he still continued to cultivate pursuits distinct from directly legal ones. "It was not, however," he says, "to law alone that I confined my studies. I endeavoured to acquire much general knowledge. I read a great deal of history; I went on improving myself in the classics; I translated, composed, and endeavoured (though I confess with a success

little proportioned to the pains I took) to form for myself a correct and an elegant style; I translated the whole of Sallust, and a great part of Livy, Tacitus, and Cicero; I wrote political essays, and often sent them without my name to the newspapers, and was not a little gratified to find them always inserted; above all, I was anxious to acquire a great facility of elocution, which I thought indispensably necessary for my success. Instead, however, of resorting to any of those debating societies which were at this time much frequented, I adopted a very useful expedient, which I found suggested in Quintilian; that of expressing to myself, in the best language I could, whatever I had been reading; of using the arguments I had met with in Tacitus or Livy, and making with them speeches of my own, not uttered, but composed and existing only in thought. Occasionally, too, I attended the two Houses of Parliament; and used myself to recite in thought, or to answer the speeches I had heard there. That I might lose no time, I generally reserved these exercises for the time of my walking or riding; and, before long, I had so well acquired the habit of it, that I could think these compositions as I was passing through the most crowded streets." The next sentence of the memoir might almost be anticipated. "The very close application with which I pursued my studies proved at last injurious to my health." He mentions, however, that other causes also tended to impair it.

On the subject of rhetoric, Sir W. Jones wrote thus at an early period of his studies:—"I have opened two common-place books, the one of the law, the other of oratory, which is surely too much neglected in our modern speakers. I do not mean the popular eloquence which cannot be tolerated at the bar, but that correctness of style and elegance of method which at once please and persuade the hearer." It may be fairly questioned whether an oratory so unimpassioned as to be best described by the words, "correctness of style and elegance of method," taken alone, should ever be the aim of the law student. Very different words would occur to the mind at the mention of Curran or Erskine. And it would be interesting to consider what are the characteristics of genuine eloquence in general, and what modifications should be introduced in the various kinds of legal oratory; how

far style should vary with the constitution of the court, and the nature of the trial.

As to the value of a deliberate and earnest cultivation of public speaking as an art, there is something in the usages of the present time which gives additional importance to it. For the prevalence of the habit in the Crown Court of the prosecuting counsel's going straight into the evidence without any opening speech, tends to bring about this result (among others), that barristers may arrive at some considerable practice without much opportunity of judging whether they can speak well or not; and, when the occasion arrives, may find themselves unprepared for it, and, adopting a slovenly and imperfectly considered style for a few occasions, never give the attention necessary for attaining to a better. Sir Samuel Romilly and Sir William Jones appear to have taken other methods than that of speaking at debating societies for the cultivation of rhetoric. A student able and willing to follow such examples would be likely to find benefit from doing so. The use, however, of debating societies is quite worth consideration. There is a disposition in some men to throw scorn on them in the mass; but it may be questioned whether they do not condemn the practice with too sweeping a censure, from the evidence furnished by the more unfavourable instances of it.

If a club of flippant and shallow men is likely to encourage the more forward of their number to become remarkable rather for assurance and fluency than for wisdom, good taste, or real force in speaking; so, on the other hand, a society composed, at the outset, of sensible men, with cultivated understandings and memories already fairly stored, would form (one would think) a public opinion trying to the nerves even of a very self-confident debater, and would be fitted (if still kept select) to develop among its members the power of ready and powerful speaking, and yet to discipline their minds still farther in the discriminating judgment of thought and expression.

Perhaps there is the more reason for some such means of training now, on account of the absence of excited party feeling in politics, which furnished one ready occasion for the exercise and improvement of vigorous oratory.

Sir William Jones is an authority for setting value on another

branch of education which is hardly enough cultivated—the study of foreign law, ancient and modern. Roman law has perhaps too nearly a monopoly of attention. An elegant eulogy upon studies of this kind is contained in Sir William's prefatory discourse to his translations from Isæus:—

"There is no branch of learning," he says, "from which a student of the law may receive a more rational pleasure, or which seems more likely to prevent his being disgusted with the dry elements of a very complicated science, than the history of the rules and ordinances by which nations, eminent for wisdom and illustrious in arts, have regulated their civil polity: nor is this the only fruit that he may expect to reap from a general knowledge of foreign laws, both ancient and modern; for whilst he indulges the liberal curiosity of a scholar in examining the customs and institutions of men whose works have yielded him the highest delight, and whose actions have raised his admiration, he will feel the satisfaction of a patriot in observing the preference due in most instances to the laws of his own country above those of all other states; or, if his just prospects in life give him hopes of becoming a legislator, he may collect many useful hints for the improvement even of that fabric which his ancestors have erected with infinite exertions of virtue and genius, but which, like all human systems, will ever advance nearer to perfection, and ever fall short of it."

The commendation of English law contained in this passage is perhaps coloured by an Englishman's partiality; but it was not the expression of an unlearned man.

Sir William Jones's biographer says of him; "His researches and studies were not confined to any one branch of jurisprudence; but embraced the whole in its fullest extent. He compared the doctrines and principles of ancient legislators with the later improvements in the science of law; he collated the various codes of the different states of Europe, and collected professional knowledge wherever it was to be found." Whatever allowance is to made for a biographer's esteem of his subject, these expressions denote a man more fitted than is common to estimate the worth of the different European systems.

Lord Eldon's letter of advice to an equity student, gives his

view of education in the latter part of his own time, with a view to the Chancery bar. It contains another strong recommendation of Coke upon Littleton, inculcates an attention to common law, and an attendance on circuit, as useful to an equity lawyer, and lays much stress on a familiarity with conveyancing forms.

To resume briefly some of the points above referred to. The value of knowledge, distinct from English law, is suggested by examples already noticed.

And there are other eminent lawyers of whom it is observable how wide a field of knowledge they cultivated, apart from the studies immediately proper to their profession. No doubt there have been men of a different kind, men whose confessed erudition and ability as mere lawyers, have been combined with but little intellectual excellence besides. And there have been cases (perhaps that of Sir Vicary Gibbs may be so considered) in which an early and scholarly classical education had cultivated habits of refined taste which could give a grace to the more austere studies of later years; while, nevertheless, the attractions of more general knowledge have been a good deal disregarded. But it is natural to expect and desire to find instances of another sort. The studies and duties of the English bar call for an acquaintance with varied kinds of learning.

Real property law is connected with the history of feudalism, constitutional law with that of the English government, and with the principles of government in general, commercial law with the growth of trade and manufactures, criminal law with the discussion and application of moral rules. The business of an advocate brings him into contact with the examination of the motives and dispositions which occasion or modify human actions, and some analytical study of the mind of man, in the abstract, seems not useless with a view to such an employment. Again, it is almost too little to say, that the laws of England, upon many subjects, derive illustration from a comparison with those of Rome. There are such points of resemblance and connection that a moderate amount of time spent on the civil law is among the most obvious of the preparatory studies for the English student.

And it is not these studies only that are fitted to be of real advantage to a lawyer; versatility and enlargement of mind are

of use in professional duties, and so is a cultivated and refined taste.

It could scarcely be said with truth of any branch of practical science, that it would not ever be of service to an advocate, and the advantage is real, though it may more easily escape attention, of gaining an acquaintance with all wholesome and sterling literature (in so far as such a habit does not trench on more essential studies), as tending to raise the tone of the mind generally, and to make it more influential on others, on account of a genuine superiority. With respect to a deliberate cultivation of the power of public speaking, there seems reason to doubt the wisdom of the present comparative neglect of it. Several causes may minister to this: one is an idea that eloquence, as well as poetry, is allotted to some favoured persons only; and that there is something of conceit in the attempt to cultivate the power of speaking, as employing pretensions to such an exceptional talent. But it may be answered, that it is well that those who would never be great orators, should yet speak with correctness and clearly; that there is some inconsistency in a man's going to the bar at all (except as chamber counsel) if he disclaims even a moderate aptitude for speaking; and that it is not desirable, either for the client's interest or the barrister's reputation, that the first dubious attempt should be made in a case where there are practical results immediately involved.

Whether preparation and practice be more or less valuable with a view to make a really powerful speaker, they seem the proper means for correcting positive faults of style, and supplying the degree of confidence, without which good enough materials will not be well handled.

And in this, as well as many other things, it may be generally true, that he that aims high will shoot high, though he shoot not so high as he aims.

The ancient law-books recommended by the authorities before cited, are now seldom seen in the hands of practical lawyers, or, perhaps, even of practical students. But it may naturally strike a reader as strange that this neglect has prevailed so greatly. Is it really the case, that nearly all which is of much value in them for present use, is to be met with in a serviceable form elsewhere?

or is it not rather that students, disgusted with their supposed dryness, and unable at first to tell what parts of their contents are obsolete, do not fairly test their worth ?

Whatever opinion be entertained upon this point, I believe it will scarcely be doubted that there is at least some reason for the importance attributed to companionship in study—the companionship of a few carefully-chosen associates, in a hearty, assiduous prosecution of learning ; if both general and legal, so much the better ; but of legal studies at any rate.

Congenial men, resolutely set upon such a plan, would be likely to place their standard of attainments high, and to arouse in one another tastes for various kinds of excellence which at first were not common to them : a friendly criticism might detect and expose the weak points in their several theories or plans, while there was still time to change ; and the discouragements which attend upon the lonely student would be lightened by the consciousness of others struggling upward amidst like difficulties and with like aims. Wearied and refreshed by turns, but seldom all together, such comrades in the long and rugged ascent which leads to excellence in our profession, might be likely to find their journey less trying and more speedy than that of the traveller who passed on from point to point alone.

The energy which sometimes accompanies loneliness, and seems almost to outweigh its disadvantages, can hardly be unattainable amidst more social studies ; while these might increase its value by contributing to a better direction of its efforts.

And not the least pleasant attendant of such a course might be its retrospect, when in the possession, if not of success, yet, at least, of the merited friendship of companions more successful than himself, the student should retroverse in memory the old path, rich to him not only with recollections of energy and patience, and of a liberal and philosophical pursuit of the profession, but also with far-extended recollections of the sympathy and esteem of his fellow-travellers.

ART. III.—REPORTS OF CASES

Decided in the Court of Probate, and in the Court for Divorce and Matrimonial Causes. By M. C. MERTTIUS SWABEY, D.C.L., and THOMAS H. TRISTRAM, D.C.L.

IT was a whimsical idea of William the Conqueror, that one and the same judge should investigate the light details of love, and examine the disputed documents which contain the dispositions of our dying moments. Yet, whimsical as it was, the native conservatism of the English mind has carried this idea safe and unscathed through the havoc and destruction which have overwhelmed the old consistories, where it first displayed itself. For, though we have now two courts for these contrasted subjects, it is one judge only who presides over Her Majesty's Courts of Probate and of Divorce.

Upon the weight and importance of these two judicial provinces it is needless to observe. The learned judge himself, when he responded to the address of the Bar of the new court, said: "I assure you unfeignedly, that I stand much in need of some such encouragement as you have given me; for I cannot take my seat in this court, without feeling many anxious fears lest I should prove unequal to the discharge of the duties which I have taken upon myself. I am now fully assured of the kind feeling of the Bar. I also place the utmost confidence in their learning and honour; and I am sure that their learning will supply me with the information which is necessary to enable me to discharge my duties, and that their honour will prevent them from attempting to use their learning as a means of misleading me." His Lordship thus evinced his sense of responsibility on entering on his new sphere of action; but a perusal of the reports now before us will show that the fears which he was pleased to express were perfectly groundless.

These reports contain his Lordship's decisions in the Court of Probate, and as Judge Ordinary of the Court of Divorce and Matrimonial Causes,¹ and are the only authorized publication upon

¹ They have been revised (we understand) by himself.

these subjects. The contents, as we have intimated, are twofold. Some pages refer to the *Libitinæ quæstus acerba*, the vexed questions of testacy and intestacy. Other pages contain the equally complicated difficulties of which the *mater sæva cupidinum* is the cause, and in the latter the novel woes of a co-respondent will be found to illustrate the further Horatian observation, *deprendi miserum est*.

This volume thus contains the accredited reports upon two most important sections of the law ; and they are the more vitally necessary to the Bar and the practitioners, that in each section the public and the profession have commenced a new era. The last wills of our decaying years, and the delusive follies of our early and passionate days, are subjected to new laws, and are examined by new tests. We have entered a new world, where our old experiences will only puzzle, and cannot enlighten us.

In both these respects, an immense impetus has been given to litigation. But we are not of those that feel either a morbid regret for a past state of things, or an unreasoning fear for the future ; still less are we surprised that such has been the result of the legislation of the last session of Parliament. As the old system of the Canon law stifled even wholesome litigation, the unthinking part of the public congratulated itself that there was no vice in married life, and no fraud in matters of succession, because the cry of the injured never reached the outer public. This increase of litigation may therefore be nothing more than the uprising to the surface of the stream of what formerly rotted below, and more slowly but more effectually poisoned the surrounding air.

These reports are learned and condensed, and at the same time sufficiently full for the purposes of clearness and illustration. They are an admirable commentary upon the acts, and show how the learned Judge has addressed himself to the practical details, as well as to the great points, of his new jurisdictions. They will be indispensable to the profession.

In the Probate Court, the improvements of the common form in its new development are given with care and exactness; and we have also several interesting decisions upon the more important topics of testamentary law.

In "Robins and Paxton *v.* Dolphin," is an important judgment upon the vexed question of an English marriage succeeded by a Scotch divorce, and followed by a French will, involving a question of domicile of great legal delicacy and moment.

Haddon *v.* Fladgate is a case, *primæ impressionis*, of deep interest at the present time. Here a will was made by a married woman, living separate, under a verbal agreement, from her husband, and supporting herself by her own earnings. The Judge has held that the property acquired by the woman since her separation from her husband became her separate property, and that all the rights incident to separate property, amongst which is the right of bequeathing it, attached.

The reports in Divorce are particularly rich in cases of all degrees of importance, and amongst them is the great case of Hope *v.* Hope, also *primæ impressionis*. There it is for the first time determined, contrary to the doctrine of Canon law, that where a husband and wife are *in pari delicto*, neither can sustain a suit for the restitution of conjugal rights against the other. They are husband and wife in name only, and have no rights as against each other. The enunciation of this salutary principle by the learned Judge, and the arguments upon which it is founded, demonstrate, however, that the doctrine of *compensatio criminis*, which is retained in the new Court, is entirely false as a bar even to a claim for divorce, and should be abolished by law as soon as possible.

ART. IV.—LORD JUSTICE KNIGHT BRUCE.

IS it fitting and proper that, while a judge is yet alive and on the bench, his judicial qualities, abilities, and performances, should be freely, though respectfully, discussed in print?

The answer to this question must depend greatly upon the character of the individual judge. In those rare instances where abilities falling short of the average calibre, or (a thing far more to be regretted) the absence of fitting judicial qualities, would compel unfavourable comments, silence becomes a duty. "Thou shalt not speak evil of the ruler of thy people," is a precept religiously to be observed *in spirit* towards those whose duty it is to dispense justice. The sphere of usefulness of a judge decidedly below par, already contracted by his own shortcomings, would be still further limited by a hostile or unfavourable review of his judicial performances.

In such cases as these, the press, wisely shrinking from the dangerous office of censors, ought, we conceive, to leave the merits of the particular individual to be weighed and appreciated by the fitting tribunal; we mean, by the bar and the other members of the legal profession practising before him.

In the remarks just made, we have stated the obligations toward silence most strongly against ourselves. We have treated ourselves merely as an ordinary branch of the vast tree of the press. But such is not our true position in reference to the question put. There is, as above intimated, a fitting and necessary tribunal by which the judicial performances of the highest and most eminent judges are daily weighed and considered. In this country, in matters judicial, the question, *Quis custodiet ipsos custodes?* is readily answered. The vast jury of the legal profession sits daily in judgment over the judges who hear and determine their clients' causes; and free discussion and liberal comment amongst the members of that jury are things *that must be*.

In hoc statu, to use a favourite expression of the eminent judge of whom we are about to speak, *professional* discussion

being a necessity, it might be doubted whether the same duty of reserve would exist in the case of a publication intended chiefly, if not entirely, for professional eyes. Certainly it would not exist to the same extent.

But we are happily absolved from all necessity for going minutely into the question touched upon. In attempting a sketch of the judicial qualities, abilities, and performances of Lord Justice Knight Bruce, there will be so much to hold up to esteem and admiration, so little comparatively to notice with regret, that, except in the eyes of those who would regard a judge as something altogether too sacred for comment, our observations, so far as they may be entitled to weight, can be open to no objection as tending to depreciate the dignity either of the individual or of his high office.

To proceed, then, to our task. Adopting the order followed at the outset—we will treat, first, of “judicial qualities,” using the words in the sense of “moral qualities” as distinguished from mere legal ability. Chief of such qualities we place “judicial honesty,” meaning thereby real, practical, pervading anxiety to do right. Despatch of business, good temper, consideration for the suitors, courtesy to the bar, are as nothing without this.

Amongst ingenious stories invented in illustration of judicial idiosyncrasy, we have that of the profound but dilatory lawyer, who, lamenting over his sins of delay, consoled himself with the reflection, “that he had never given A’s property to B,” and we respect him. We have also the story of the kind-hearted but too easy judge, who is represented to us as saying, “That it mattered not which way he decided, since *if A didn’t get the property B would,*” and we regret that such a saying could have been invented of any judge.

Steady honesty of purpose is the first thing, and yet how difficult to make this the pervading motive? The wearisome argument of one counsel, the bad judgment of another, who, running an intellectual tilt with the judge, makes him almost counsel for the opposite party, the indignation or disapprobation excited in the judge’s mind by some appearance of unfair advantage taken by one side or the other; the inclination to struggle against strict law, when there exists a strong suspicion, or perhaps a moral

conviction that strict law may or will work injustice—all these are difficulties of no mean order, and temptations of no small strength to swerve from the strict path.

Well, we believe Lord Justice Knight Bruce possesses and puts in practice, in no common degree, this honesty of purpose. Certainly his trials are greater than those of judges of meaner ability. A case is barely launched, when, with a rapidity and acuteness which must be witnessed to be understood, the leading counsel on both sides are plied with vigorous questions, the object of which is to eliminate, if possible, mere rubbish (*quisquilius matter*, perhaps our Lord Justice would say), and get at the real points in dispute. In the course of this process, the acuteness of the questioner often leads him to form an opinion (possibly a correct one) concerning, not merely the points for adjudication, but the hidden springs and motives of the litigation. Should this view behind the scenes be unfavourable to either party, the judge has to struggle against allowing himself to be unduly swayed by it. Thus, his very clearness of vision becomes a snare and a trial to him.

Upon subordinate judicial qualities we shall not dwell. Truth forbids our denying the existence of occasional irritability, the combined effect, as we conceive, of constitutional temperament and of quickness of thought chafing at sluggish understandings. But let us mention an incident which is probably in the recollection of many of our readers. In May 1850, Vice-Chancellor Wigram became, through infirmity of eyesight, unable to sit, and in the month following the Vice-Chancellor of England fell ill. From that time, until the rising of the court for the long vacation, Vice-Chancellor Knight Bruce transacted single-handed the whole business of the three Vice-Chancellors' Courts.

During this interval, when slower intellects must have sunk beneath the labour, or at least have betrayed the irritation due to an overwrought frame, Vice-Chancellor Knight Bruce rose to the emergency, and at the last sitting of the court before the long vacation, he was addressed by the then Attorney-General in words to the truth of which our own memory bears willing testimony. They were as follows:—

“Before the court rises for the vacation, I am desirous of saying,

on behalf of the Bar, a few words. It is now for several weeks that the whole business of the Court of Chancery, distributed among the three Vice-Chancellors, has been borne by your honour alone. That business, at all times very heavy at this season, has been this year greatly increased by the numerous applications which have arisen under a new practice introduced into the court. I am requested by the Bar to testify our respectful admiration at the knowledge and ability with which this mass of business has been disposed of, and to express our gratitude for the unvarying and unwearied attention with which your honour has listened, even to the youngest among us. I need not add how gratifying it is to me to be made the organ of this communication."

And here, whilst treating of moral qualities and peculiarities, we would advert to the opinion of Lord Justice Knight Bruce, with reference to the principle which ought to govern a court of appeal whilst reviewing the decision of the court of original jurisdiction; viz., that "*to doubt, to entertain grave and solid doubt, is to affirm.*" The views of the Lord Justice on this point will be more fully referred to presently. We allude to them here, because we conceive that, whether correct or erroneous, they involve (perhaps partly proceed from) a feeling of kindness and courtesy towards inferior judges, which must ever command our esteem. This feeling is apparent in almost every reversal in which the Lord Justice has part. Whether the judgment appealed from be that of a Vice-Chancellor, or of a Commissioner in Bankruptcy, no opportunity is lost of adverting to circumstances of difference warranting a different view. Thus, to take a single specimen, "This case was so slightly argued, and so little authority was referred to before the Vice-Chancellor, that I hardly consider myself as differing from him."¹

Passing now from moral to the intellectual qualifications—we shall, under the head of *abilities*, say but little. Our own estimate of the intellectual power of the Lord Justice will indeed have already appeared from our previous remarks. In acuteness and rapidity of apprehension, we seek vainly for a rival. Of that general reading and information which enable the judge at

¹ *Croly v. Weld*, 3 De Gex, Macn. and Gord., 996.

once to appreciate the *specialités* of the particular case, there is good store. The deficiency, if any, lies, if we may presume to hazard an opinion, in the department of natural science; but we say this doubtingly. In those departments of learning, which, together with the law itself, make up the vast branch of "moral science," the most extensive knowledge is shewn. Nothing seems indeed to be wanting in this respect. Ethics, history, and the knowledge of language are at once brought to bear, and the technicalities of our equity system (itself a mitigation of the technicalities of the common law) are, except where authoritative decisions impose too strong a fetter, tried and tested by comparison with the doctrines of the civil law, and subordinated to the principles of general jurisprudence.

But we feel that we have unconsciously strayed into the third division of our subject; viz., the *judicial performances* of the Lord Justice. It is indeed difficult to consider the cause without the effect—the master-mind without its masterly decisions; and we proceed, therefore, at once to speak with all frankness of the judicial performances of this eminent personage, though with a full consciousness of the danger of error, when criticising the operations of an admittedly superior intellect.

Within our own sphere of observation, what has chiefly struck us has been the keen, accurate appreciation of the facts of the actual case in hand, without regard to the trammels of previous decisions. Not that the previous authorities are unheeded, but, as fast as they are cited, they are submitted to the most searching analysis, the facts involved are distinguished from those of the case under consideration, and the latter are again appealed to. All this is during the argument. When the judgment itself comes, we find the analytical power of the judge almost torturing its possessor, by the suggestion of possible difficulties, which a slight variation in the facts might have corrected. Not unfrequently the judgment runs thus—"How this case would have stood if, &c., &c., I need not say, for I consider it must be assumed that, &c., &c. Again, how this case would have stood if, &c., &c., I need not say, for in my opinion the fair inference from the facts before me is, &c., &c. Upon the particular facts before me, and without in the least impeaching the authority of

the decisions in *Jones v. Thompson*, *Smith v. Johnson*, and *Jackson v. Robinson*, I am of opinion that, &c., &c."

The advantages and disadvantages of this mode of judicial handling are obvious. Of the former, the chiefest is the undeniable result, that justice is done in the particular case. Amongst the latter, the absence of a proper exposition and development of judicial principles is at once noticeable. The judge has, we conceive, a twofold duty to perform: to decide the case before him, and to lay down principles for the future guidance and assistance of others who may at a later date experience difficulties similar to those which the judge himself is grappling with. The first of these duties, which it must be admitted constitutes the "*weightier matter of the law*," is admirably performed by Lord Justice Knight Bruce. As regards the latter, candour compels us to admit that his performance falls short of his capacity. Of his *ability* to accomplish what other judges with less powerful minds have done so admirably, no one who has sat in his presence, and observed his thorough acquaintance with the principles of our Equity decisions, can entertain a doubt. Indeed, this judge, so cautious in his final judgment—so sparing when delivering that final judgment in the enunciation and elucidation of general principles, frequently, in the course of the argument, lays down, as constituting elementary and well-ascertained doctrines of equity, propositions with which many of his legal hearers are far from familiar. In fact, the legal student, while frequently missing, in the judgments of Lord Justice Knight Bruce, those instructive developments of equity doctrines which gave to Vice-Chancellor Wigram's decisions, as reported by Mr. Hare, so deserved a reputation, might yet, while listening to the progress of a cause before the former eminent person, glean from bold *dicta*, and sweeping general questions addressed to counsel, a knowledge upon many points of equity, which he would in vain seek for elsewhere. Indeed, we are by no means sure that the marked absence which characterises the judgments we are criticising, of any distinct reference to general principles, is not due, in some degree, to the reluctance of a highly trained mind to enunciate in terms that which it assumes as elementary.

We must not, however, be understood as intimating that the

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judgments of the Lord Justice do not often contain much that is valuable in principle. For instance, we know no judge who has more ably laid down the true principles on which the authoritative decisions of former judges should be weighed and considered. Thus, in the great case of *Boyse v. Rossborough* (where the question, as most of our readers will recollect, was, whether a mere legal devisee in undisturbed possession could file a bill against the heir-at-law, for the purpose of having the will established, though no trusts were declared by the will), Lord J. Knight Bruce, in reference to the argument, that in all the old decisions there was some trust or special circumstance accounting for the exercise of jurisdiction by the court, expressed himself thus:—

Let it be assumed, though I do not represent myself as persuaded, that no instance of the exercise of the jurisdiction in question upon a simple devise in fee of a freehold estate, without charge or trust of any kind, can be found. Still I say, borrowing from Lord Eldon's judgment in *Bax v. Whitbread*, that I will not confine myself to the inquiry, whether a case precisely the same has ever occurred, or take, "as my rule of acting, that circumstance instead of the principle decided by former cases." Why am I, without necessity and without reason, to treat the example as limiting the rule? It has been properly conceded, that the series of direct decisions establishing wills in this court, at least those previous to 1841, cannot be set at nought, but bind as far as they extend. If so, they must be considered not as having created (which they could not), but as having obeyed law, that is to say, unwritten law. Upon questions, however, of unwritten law, the force of authorities and precedents is not confined to cases of which all the circumstances, however accidental, agree with theirs, to instances as like as *Apis Api*; but where a positive law forbidding the extension is not shown, extends to those which, differing in some particulars, differ in no essential circumstance, or cannot in legal reason or legal principle be substantially distinguished. We should otherwise indeed be in a dark and strange state. Lord Coke and a celebrated Frenchman of the same age say, one, "*Nullum simile quatuor pedibus currit*;" the other, "*Tout exemple cloche*," and cases are continually governed in our courts by authorities, not, according to our vernacular phrase, upon all fours with them. In the language of a distinguished jurist, "*Quid enim notius et certius quàm exempla non restringere regulam?*" and again, "*exempla non restringunt regulam sed loquuntur de casibus crebrioribus.*" It seems to me that to accede to the defendant's view of the precedents, would be unnecessarily to cripple the power of usefully administering justice; would be practically inconvenient and theoretically wrong; would be to confound essentials and accidentals; would in effect be doing what Lord Eldon, in *Bax v. Whitbread*, so manifestly disapproves when he says, "I think it

better to declare that the court will not abide by these decisions, than to overrule them in effect, professing to abide by them." So I venture to say here, with respect to those almost innumerable cases upon the establishment of wills, abounding in our records, of which no man disputes the soundness.¹

On the other hand, in a later case, we find the following observations:²—

It can seldom be right, I agree, to consider the extent of a rule as being only that of the examples of it; but there must probably be surer and more dangerous error in stretching a rule beyond the reason for it. That is what the plaintiff, I think, seeks to do here in opposition to the maxim, as sound as it is familiar, which says, "*Nulla juris ratio, aut sequitatis benignitas, patitur ut quæ salubriter pro utilitate hominum introducuntur ea nos duriori interpretatione contra ipsorum commodum producamus ad severitatem.*"

We know of no reported judgments affording better general guides as to the spirit in which the old precedents are to be approached, than those contained in our last two extracts.

The next leading peculiarity in the judicial performances of the Lord Justice is due to the views entertained by him, and before alluded to, with reference to the "*ratio decidendi*" in regard to equity rehearings. They involve a point of some interest, and by no means clearly settled, and upon which we shall say a few words.

In the Court of Chancery, when a decree has been made by a judge, and either party is dissatisfied with that decree, the appeal assumes the form of a petition to the Lord Chancellor, praying that the cause may be reheard. The appeal is in theory *not* the removal of the cause from a subordinate court to a higher (as in the case of, say, a writ of error from one of the Common Law Courts to the Court of Exchequer Chamber), but a rehearing of the same cause in the same court, by a judge of higher judicial authority. In fact, until the decree is actually enrolled, there is no limit to the *power* of the court to rehear, except that imposed by the judicial *status* of the judge before whom a rehearing is sought. Thus the Master of the Rolls or the three Vice-Chancellors may rehear their own decrees, but not those of each other. The Lord Chancellor, on the other hand, has power to rehear not

¹ *Boyse v. Rossborough*, 3 De Gex, M., and G., 846.

² *Micklethwait v. Micklethwait*, 1 De Gex & Jones, 521.

only the decrees of the four inferior judges, but also those of any previous Chancellor.¹

Such being the correct technical view, the result has been that some Lord Chancellors, when rehearing the judgments of judges of inferior status, have treated themselves as in the same position as if the matter were originally before them. Lord Cottenham, for instance, appears to have been strongly of this opinion. Thus, we find him in one case almost apologising for attributing weight to the previous judgment of the then Vice-Chancellor of England. The following were the words used by him :—

All this would not be of weight if the question was entirely free from doubt. But I find that the *Vice-Chancellor* has expressed a very decided opinion that the company has no such right ; *and, although it would be my duty (if I were bound to decide on the propriety of the opinion so expressed by the Vice-Chancellor) to decide that point without reference to the opinion of that learned judge*, when I am weighing, not the question of law at all, but the expediency of postponing the period of decision until the opinion of a court of law is obtained in November, I cannot help thinking that I am justified in allowing the opinion of the *Vice-Chancellor* to have so much weight as to induce me to think that there is a reasonable probability, at least, that the court of law may be of opinion that the company has no such right as they claim.²

Again, in those cases where the judgment to be reviewed has been that of a master, and the reviewing judge one of the superior judges of the court, the disinclination to attribute any weight to the decision of the inferior official has been still more strongly marked. Lord Langdale, we believe, on one occasion took counsel to task very vigorously for intimating that the case was at least doubtful, and that the circumstance that he held the Master's decision, was entitled to consideration.

Now, we believe that the Lord Justice, ever since he first mounted the bench, has consistently contended for a contrary view. He has frequently been heard, while Vice-Chancellor, to attribute

¹ We must not be understood to intimate that the suitor's *right* to a rehearing is co-extensive with the *power* of the court to rehear. On the contrary, the practice is clearly settled that there can be no second rehearing before the judge of appeal, without leave obtained upon a special application.

² *Brocklebank v. Whitehaven Junction Railway Company* ; 15 Simons, 638. The italics are our own.

considerable weight to the Master's decisions brought before him for review. In his capacity of Lord Justice, we find him recently thus expressing himself on the subject with reference to an appeal before him :—

The suit is, however, before us under other conditions ; for though, in a sense, we are rehearing it, yet in a sense, and according to ordinary acceptation, this is an appeal ; and the pleadings and evidence here being merely those which were before the Master of the Rolls, we must so view the matter. But it is, I apprehend, generally understood to be the duty of an appellate judge to leave undisturbed a decision where he is not thoroughly persuaded that there has been error. It is, I believe, in appeals, as much a rule or maxim of the English Court of Chancery, as it was of the civil law, that to doubt—to entertain grave and solid doubt—is to affirm, because to reverse is to disturb an existing state of things. Certainly, it has not been uncommon for judges, when reversing, to avow that they have hesitated, and to express distrust ; nor, considering that sometimes, or perhaps often, the judge appealed from is a man not less likely to be accurate than the judge appealed to, and how often reversals and affirmances are alike reversed, does it appear to me that this can justly be blamed. But still, in whatever form, and with whatsoever sincerity, terms of deference and diffidence may be used, a reversal can scarcely proceed from a judge fit for his office, without a conviction, in his own mind, that he is right.¹

Now, in our opinion, the Lord Justice has throughout been right. He has regarded the substance, and disdained the technicality. Nay, it may be doubted whether sitting, as he now does, under an act which gives him the style of "*Lord Justice of the Court of Appeal in Chancery*," the Lord Justice is not right technically, as well as in substance.

Be this as it may, this peculiar view of the Lord Justice, that *to doubt, to entertain grave and solid doubt, is to affirm*, will be found communicating a peculiar tinge to his judgments, and to his legal treatment of the cases brought before him.

Passing from these peculiarities of legal treatment, we shall now call attention to certain peculiarities of style and manner by

¹ Attorney-General v. Corporation of Beverley ; 6 De Gex, M., & G., 263. The ultimate fate of this suit forms an instructive commentary on the observations of the Lord Justice. The decision of the Court of Appeal, affirming that of the Master of the Rolls, was subsequently reversed in the House of Lords by Lord Cranworth (then Lord Chancellor), Lord Brougham, and Lord Wensleydale.

which the Lord Justice is perhaps best known to his more superficial hearers, combining, as the Lord Justice does, the most intense hatred for whatever is low, mean, or unjust, a strong sense of the humorous, and powers of sarcasm and ridicule which have rarely been equalled; his judgments furnish some of the most remarkable instances of prose satire to be found in our language. That this gifted personage has occasionally exceeded the bounds which perhaps he would in his cooler moments himself prescribe to a judge, we cannot doubt; indeed he is reported to have said on one occasion, in reference it was supposed to his brilliant satire, as transferred to the public prints, "I see occasionally things ascribed to me which read like fairy tales;" nor can it be denied that even in his considered judgments he has occasionally gone beyond the province of the judge.

But we cannot bring ourselves to regard these excesses very strictly. The great Roman satirist, looking at the debased, nay, rotten state of the society surrounding him, and feeling within him the full power of lashing it, said, "*Difficile est satiram non scribere*," and so he wrote. So when the low and sordid motions, the petty jealousies, and interested schemes of litigants, are forcibly thrust under the notice of a judge such as we have described, abstinence can be hardly hoped for. Take for instance the judgment in *Barrow v. Barrow*.¹ It contains passages which most persons would feel to have transgressed the true limits, and yet how few, after writing these passages, would have had the resolution to suppress them.

We will let the judgment speak for itself. It is at once one of the most brilliant, and, at the same time, we must own here and there, one of the least defensible that we could quote:—

These, and two other suits, are the fruit of an alliance between a solicitor and widow, who, for the first sixty days of their married life—namely, from the 30th of July, to the 28th of September, 1850,—lived as well as quarrelled together; but at the end of that period parted, exchanging a state of conflict, which though continual, was merely domestic, for the more conspicuous, more disciplined, and more effectual warfare of *Lincoln's Inn* and *Doctors' Commons*.

They are now here claiming one against the other—he, by force of the marriage; she, notwithstanding the marriage, her life interest on the dividend of a sum of £10,000 £3 per cent. consolidated annuities, which sum,

¹ 5 De Gex, M., & G., 782.

producing of course £300 a year, was settled upon her for life, with a power of testamentary appointment over the capital, by a settlement made on her former marriage with Mr. C. in 1839, and another deed of that year.

The courtship between Mr. B. and Mrs. C. began not much, if at all, earlier than the year of their marriage; as to which his depositions contain a passage that in point of accuracy may be questionable, but in point of gallantry can scarcely be so; namely, "I did not begin to court her, but she began to court me." And he thus (perhaps with equal gallantry) speaks as a witness of their ages, "I was twenty-nine years old when I married her, and when I married her she acknowledged to be forty-five years old, *but I believe she was more.*" Certainly in 1850 she had achieved more than two-and-thirty years, but was without a family, and was enjoying a net income under £800, but not under £600, if under £700, per annum, of which her equitable interest in the £10,000 consols formed a part. She had, I believe, become a widow in 1847. Her present husband and opponent, when he accepted or was accepted by her, was a practising solicitor, possessing, as it seems, little if any private fortune, but a bachelor; yet, though a bachelor, versed somewhat in the ways of women, as having at least eight living children by three living mothers, a combination of circumstances which, known to Mrs. C. when she resolved to marry, was not viewed by her as uncommendatory of the proposed connection.

Seldom, on the whole, can a couple before marriage have laboured so diligently to secure an unpeaceable life; while, after it, we find them fresh from church handselling the wedding-day by a testamentary controversy. For, under the marriage settlement of the evening previous, as well as the deeds of 1839, she had power of appointment by will; and a will in exercise of them having been prepared for her over-night by the bridegroom, the nuptial festivities are terminated by this remembrancer of death, which they retire with a clergyman to consider in private; when the paper or part of it being read, she observes that it bestows on her consort a very substantial legacy, namely, £5000. To this, as diminishing materially a provision made by it in favour of the eight children of the ladies of the latter (for whom, with no common generosity, she had certainly intended to provide), a debate follows, which after proceeding some way was adjourned, and the bridegroom and still intestate bride drive from Davies Street (where the breakfast was had) to his own house in one of the eastern squares. There a warm interchange of sentiments ensues, which they both call an altercation—she in stronger terms than he

'It must not be supposed from this the fair sex are allowed complete immunity from the polished irony of the learned judge. On one occasion he said, speaking of a litigant, "Now, although a woman, it was possible she might change her mind." And on another, when the capacity of an infant to commit fraud was under discussion, "I should like to see the man bold enough to affirm that a young lady of seventeen is not *doli capax*." For the former passage see 2 De Gex and Smale, 585. The latter observation we give from memory.

uses—the subject being the £5000 legacy. But the lady after a time stops the argument by acquiescing, and accordingly signs, publishes, and declares the instrument testamentarily. Two servants attest as witnesses; and this inauguration accomplished, the bridegroom and his testatrix set out for France and Italy on a honeymoon tour, not altogether an halcyon one, but proving, in truth, an untoward expedition, in which not they alone, but their companion the will, also suffers. For in an affair at Pisa, where for some time their quarters were, the lady appears to have torn it piecemeal, *animo* (as lawyers say) *cancellandi*. The husband seems to have collected the bits, which are produced here from his custody, but in a state of conglutination and cohesion absolutely disavowed by her, and necessarily, I apprehend, to be ascribed to him.

Let it not, however, be supposed that in these remarkable judgments the judge is merged in the satirist. The setting is sometimes too rich almost for the brilliant, but the real gem is there. Neither be it thought that Democritus holds undisputed sway. Who can read the following without tracing the heartfelt regret of the speaker at witnessing a rupture between old friends? One is perhaps the less prepared for such a shew of feeling, because men in later life, whether on the bench or in the cottage, are commonly little touched at heart with the concerns of those who move in an entirely different sphere:—

Mr. Danks, the appellant, a timber merchant at Great Bridge in Staffordshire, had been after, or in and after the year 1849, employed by his near neighbour and familiar acquaintance of many years, Mr. Farley, the respondent, a publican, and plumber and glazier, to do work, and supply materials or goods for him. For this Mr. Danks had sent in his bill, amounting to something between £96 and £97. Mr. Farley considered, or professed to consider, the bill too high, and disputed part of it, contending that the amount claimed should be reduced to the sum of £85, 11s. 10d.; so, and upon no greater matter—upon a matter that, if they had not good sense enough to settle it for themselves, some respectable neighbour would probably, upon application, have adjusted for them in an hour—began (as I collect) the career of cost, and heat, and hatred, of reproach, scandal, and misery in which they are now engaged, of which neither this day, nor this year, nor perhaps another, will I fear see the end, and which seems well to exemplify an old English saying, that the mother of mischief is no bigger than a midge's wing.

But perhaps the most remarkable of the judgments of the Lord Justice, as illustrative of his particular manner, was that in the *Agapemone Case*.¹ There, a Mr. Thomas, a member of the

¹ *Thomas v. Roberts*, 3 De. Gex and Smale, 758.

singular quasi-religious establishment called the "*Agapemone*," came to the Court, of which the Lord Justice, then Vice-Chancellor, was judge; claiming as against his wife, Mrs. Thomas, the custody of their child, an infant of tender years. In a most elaborate judgment, in which all the relevant facts were stated with the greatest detail; the then Vice-Chancellor thus overwhelmed with ridicule the establishment of which Mr. Thomas was an habitual inmate, and which, through his wife's aversion for it, had been the real cause of the conjugal differences.

To what home, however, in such an event—to what abode, is he to take the child? To none suggested, except the somewhat mysterious establishment so often mentioned during the argument and in the affidavits, of which it seems necessary to say a few words.

It appears that "the Servant of the Lord," with or without the aid of others, has founded or formed a kind of cœnobitical establishment, which, though placed not on the Euripus, but on the Bristol Channel, he has denominated *Agapemone*, a name no doubt adopted in order to make the people of Somersetshire understand or guess its object; which, however unluckily, I fear that few either there or elsewhere in any very clear manner do. "The Servant of the Lord," as may be supposed, presides and governs, but not perhaps strictly as an archimandrite or abbot, for the establishment scarcely seems to be a convent, either in connection with the Greek Church or otherwise.

Its inmates, who are not few, and are of each sex, can hardly be nuns and friars; for some, though not all of them, are married couples, and the men and women are not separated. They, however, call themselves and address each other as brothers and sisters; there appears to be something, whether really as well as professedly, or professedly alone, in the nature or design of the institution, which perhaps might render it fit to be described as a spiritual boarding-house: though to what kind of religion, if any, the inmates belong, does not I think appear. I believe that they do not attend any place of worship in or out of this establishment. They sing hymns, I think, addressed to the Supreme Being; but, as I collect, they do not, in the sense of supplication or entreaty, to God, pray at all. The *Agapemonians* appear to set a high value on bodily exercise of a cheerful and amusing kind. Their table, according to the description which Mr. Thomas gave me of it, must be unexceptionable. It does not appear whether the *Agapemonians* hunt, but they seem distinguished both as cavaliers and charioteers. They play, moreover, frequently or occasionally, at lively and energetic games, such as hockey, ladies and all; so that their life may be considered less ascetic than frolicsome. The particulars, however, of the *Agapemonians'* esoteric existence, being not open to general observation, are little, if at

all, known beyond their own boundary. But to works of usefulness or charity without, they do not seem, so far as I can collect, addicted.

Then passing from a half playfully sarcastic tone—to one at first serious and then indignant (and no one who heard the judgment delivered will readily have forgotten the impression produced by the transition), his Honour continued thus—

Now this is the establishment in which Mr. Thomas has for a considerable time been, and is, one of the dwellers; he has, I apprehend, no other home, and thither accordingly I suppose that he would take his son. But God forbid that I should be accessory to condemning any child to such a state of probable debasement; as lief would I have on my conscience the consigning of this boy to a camp of gipsies!

Of course we are fully conscious that, in the opinion of a large proportion of the legal profession, those departures from the ordinary judicial gravity are blameable. The judge, in their opinion, ought to sit unmoved, in appearance at least, and unravel calmly the tangled web presented to him by meanness, bad faith, or cunning. Should he seem indignant, then it is said that he lays himself open to suspicion of having, through zeal for that justice which stands higher than either equity or law, gone astray from the paths of law and equity. Should he wield the scourge of ridicule, then it is suggested the dignity of the bench may suffer in his hands.

There is, no doubt, considerable force in these arguments, though we are by no means prepared to admit that it can never be the duty of a judge to “abash bold vice,” or “laugh proud folly down.” To recall, however, an old observation: There is little merit in a sceptic abstaining from persecution. We might respect more the judge who, with equal indignation at heart, should moderate that indignation to a greater extent; but we should respect far less the judge who felt no indignation at all. As regards the persons punished, we confess ourselves free from all pity; they may be safely said to have almost invariably received their desert.

But passing from this debateable ground, we may refer, with unqualified pleasure, to the exquisite humour which has here and there disinterred, for the combined purpose of instruction and amusement, such dainty bits as the following: ¹—

¹ The passage is extracted from the elaborate judgment in *Stikeman v.*

A case, also, in which an infant was plaintiff, may be mentioned, as tending much in the same direction ; the plaintiff having recovered, though her conduct, if not fraudulent, was very near it, or like it. In 3 Keb. 369, it is thus mentioned—"In trespass by infant, by guardian, the defendant pleads that the plaintiff was above sixteen years old, and agreed for 6d. in hand that the defendant have licence to take two ounces of her hair, to which the plaintiff demurred, and, *per curiam*, it is no plea ; for the infant cannot licence, though she may agree with the barber to be trimmed ; and judgment for the plaintiff." The same case in Bacon's Abridg. is thus—"In trespass *quare, vi et armis, insultum fecit et totum crinem capitis ipsius Annæ abscidit*, the defendant as to all the trespass, *præter tonsuram crinis*, pleads not guilty ; and as to that, pleads that the plaintiff was of the age of sixteen years, and for a certain sum of money *licentiavit* the defendant *duas uncias crinis dictæ Annæ detondere et abscindere* ; and upon the demurrer to this plea, the court held that the contract was absolutely void, and consequently the tonsure unlawful, and gave judgment accordingly for the plaintiff."

Finally, let us offer in parting our tribute of thanks on one important point.

It occasionally happens that our judges, when unravelling some transaction on the ground of equitable fraud, some dealing between *Trustee* and *Cestuique Trust*, *Solicitor* and *Client*, *Guardian* and *Ward*, have expressed themselves in terms calculated to convey the impression that courts of equity enforce a higher code of morality, in regard to these relations, than that which might fairly be supposed to regulate the actions of honourable men.¹ We beg to enter our protest against such doctrine, the enunciation of which we believe to be often due to a reluctance on the part of our judges to bear too harshly on the frailty of mankind. We doubt extremely whether the parties whose dealings are attacked in cases of this class, are commonly men

Dawson, 1 De Gex and Smale, 111, of the Lord Justice when Vice-Chancellor, deciding that a man cannot be charged in equity on a contract made during his minority, on the ground that, without any false assertion by the infant, the other party believed he was not a minor.

¹ We allude to such expressions as the following :—"That, possibly, the defendant may have conceived that he was not doing any thing morally wrong ; but that, whatever the true moral character of the transaction, it is one which, in the eye of a court of equity, amounts to fraud." Of course, the facts may justify such expressions ; but there is, we fear, an amiable, though mischievous, tendency to indulge in them.

possessing that high sense of what is right and proper, which we ought all to cherish. We believe that our equity courts enforce a code of morality and honour far *lower* than that which ought to be the standard with high-minded and honourable men ; and that much harm may be done by tolerating the contrary notion.

Accordingly, we rejoice to find, in a late judgment of the Lord Justice, setting aside the purchase by an assignee in bankruptcy of the interest of a creditor under the bankruptcy, the following passage :—His lordship, after reading a letter of the assignee, stating his ignorance of the law (*i. e.*, of the rule in equity prohibiting such a purchase), continued thus : “Some people may think this alleged ignorance of the law a palliation. Men may, however, be honest without being lawyers ; and there are doings from which instinct without learning may make them recoil.”

We thank the Lord Justice for thus reminding us that true honourable feeling must ever furnish a rule of conduct higher than those enforced by any human tribunal. We trust he may long be spared to assert from the Bench the too often forgotten truth, that our rules of equity (high-flown as they may appear to some) are after all but a feeble and imperfect expression of the principles of morality and honour.

ART. V.—RECOLLECTIONS OF THE MUNSTER BAR.

From the Note-book of a Member of the Circuit.

MR. BRERETON, Q. C.

MR. KANE, Q. C.

MR. BUTT, Q. C.

MR. SERGEANT DEASY, Q. C.

SIR COLMAN M. O'LOGHLEN, Q. C.

RIGHT HON. J. D. FITZGERALD, Q. C.

MR. BRERETON, Q. C.

RESUMING my recollections of those gifted individuals whose society I had the pleasure of enjoying on the Munster Circuit, I find some names that deserve a place in the pages of the *Law Magazine*. William Westropp Brereton, or, as he was popularly called, “Billy Brereton,” enjoyed a fair share of assize

business. He had considerable legal knowledge, and used it judiciously; was well acquainted with the law of evidence, and technicalities of pleading; so he was a useful junior. He also was a safe man in criminal business; and though he never ventured on abstract reasoning, or sought to establish novel doctrines by proving them consistent with legal principles, he showed himself familiar with the facts of his cases; had his briefs carefully noted, and possessed a fluent, if not an eloquent, delivery. Another recommendation was his great knowledge of the character and habits of his countrymen, especially the class usually giving evidence. He also had a keen insight into the taste of juries, and was familiar with the judges, and on extremely intimate terms with most of his brethren of the bar, so much so as usually to call them by their Christian names.

Mr. Brereton was called to the Bar, Trinity Term, 1836, and selected the Munster Circuit. He had a good connection, principally in Clare and Limerick; and, I believe, at one time contemplated starting for the representation of the borough of Ennis. He was called to the Inner Bar, as Queen's Counsel, in 1852, and during this present year, 1858, on the resignation of Mr. William M'Dermott, Assistant Barrister for the County of Kerry, he received the appointment to the vacant chairmanship, a judicial office for which his ready professional learning—his business habits—his acquaintance with the character of the suitors frequenting the civil bill courts—and his obliging disposition, which has rendered him extremely popular with men of all denominations, render him peculiarly suited.

DANIEL RYAN KANE, Q. C.

Among the members of the Circuit who contributed most to the jocularly of the Bar mess is a respected native of Limerick, greatly esteemed by every member of the Circuit, Daniel Ryan Kane. It is impossible to come within the influence of his joy-inspiring presence—to look upon his ever-smiling Irish face, so well suited to his robust frame, and feel discontented or depressed. Good-humour sparkles in his merry eye, or laughs from his honest heart, and the bystanders catch the infection. We ever

hailed his presence amongst us as a treat ; for his jests were abundant, and his store of anecdotes exhaustless. Let me give a proof of the readiness of his wit. One day Mr. Kane was sitting in Court, when an action against an Insurance Company, on a disputed policy, was at hearing ; a young barrister, lately called, whose father was a physician, and one of the witnesses in the case, held a brief, which he flourished in a very conspicuous manner.

"Who is he ?" asked one of the bar of Mr. Kane. "Is he retained as special counsel ?"

"I rather think," replied Mr. Kane, "he is counsel by *prescription* !"

Mr. Kane was called to the Bar in 1825, and made Queen's Counsel in 1847. Shortly after being called, he was appointed a Commissioner of Bankrupts, before the system was placed upon its present improved footing, which gives the public the important services of that able and excellent lawyer, Judge Macan, who, with the Hon. Judge Plunket, presides over the Court of Bankruptcy and Insolvency in Ireland. For many years Mr. Kane has filled the office of Assistant Barrister for the County of Leitrim, where his abilities as a judge, and his intimate knowledge of the people, together with the perpetual flow of good-humour, which nothing can ruffle or check, make him respected as a judge, and beloved as a friend. He is an excellent lawyer, and worthy member of the Munster Bar.

ISAAC BUTT, Q. C., M. P.

Mr. Butt joined the Munster Circuit with the *prestige* of College honours, which he achieved in a remarkable degree. His father, the late Rev. Robert Butt, Rector of Stranorlar, County Donegal, spared no pains to render his only son worthy of his ancestral fame. He is descended, by his mother's side, from the celebrated philosopher Berkeley Bishop of Cloyne, and, while receiving his education at the Royal School of Raphoe, gave indications of great talents. He came, well grounded in ancient and modern learning, in 1828, to graduate in Trinity College, Dublin, where he obtained a scholarship in 1832, and his collegiate career was marked

with repeated triumphs for proficiency in classics and mathematics. Having obtained his degree in 1835, in the following year he was elected Professor of Political Economy, a chair founded by the most Rev. Dr. Whately, Archbishop of Dublin, being then in the 23rd year of his age. This was a signal proof of his abilities, for he had to undergo a severe and strict examination, and was encountered by many clever competitors. The result shewed the wisdom of the selection; nor did the chair, which has always been ably filled, sustain any loss of reputation while occupied by Professor Butt.

His great fluency, and the energy of his mind, prompted him to study for the Bar. At the Debating Societies he soon was recognised as a bold and powerful speaker, and the deep feelings of his impulsive nature found vent in appropriate language, well calculated to convince and to persuade. Rarely is the faculty of writing gracefully and readily combined with equal facility in expressing the thoughts orally. We know that Curran could not bring himself to compose any lengthened work—we know that Addison miserably failed to give vent to his thoughts when he tried to speak in the House of Commons. I might cite many other instances, but these will suffice; here there was an exception, for not only was Professor Butt a ready and able debater, he was also a clear and agreeable writer. For years he contributed to the *Dublin University Magazine*, and I understand the "Chapters of College Romance" are the emanation of his genius. A novel, the "Gap of Barnsmore," is also believed to be his composition. Mr. Butt was called to the bar, Michaelmas Term 1838, and having relations in the County of Cork, came the Munster Circuit. His agreeable manners, great kindness of disposition, and, although a strong politician, his abstinence from any offensive display, made him most popular with every member of the Circuit. In the political strife of Irish parties, Mr. Butt was quickly recognised as a staunch supporter of extreme Conservative opinions, and when a member of the Dublin corporation, encountered Daniel O'Connell in the memorable debate on the Repeal of the Union. He also appeared before the House of Lords about two years after his call to the bar, to advocate the case of the Corporation of Dublin against the Municipal Reform Bill, and acquitted himself to the

entire satisfaction of the party for whom he appeared. The organs of the Conservative party were filled with praises of the gifted orator. He was made Queen's Counsel in 1844, and defended the state prisoners tried for high treason in 1848. He also acted as counsel in many important trials, and among them defended Kirwan, tried for the murder of his wife on Ireland's Eye, a small island near the hill of Howth. He represents the borough of Youghal in Parliament, and is considered a good representative of that ancient seaport. His constant attendance at the House of Commons has interfered with his steady progress at the bar; but having heard him on some great occasions, when he took the trouble of preparing himself well, I am convinced that were Isaac Butt to settle seriously and continuously to the business of his profession, he would soon get considerable practice, and become one of the foremost members of the Irish bar.

MR. SERGEANT DEASY, Q. C., M. P.

Mr. Sergeant Deasy is a native of the county of Cork, which he now represents in the Imperial Parliament, having been born in Clonakilty, in the West Riding of the Yorkshire of Ireland. From his early years he was a diligent student, and, having selected the law for his profession, applied his mind sedulously to master its theory. He availed himself of the advantages of attending the chambers of some of the eminent lawyers in London, and when called to the Irish Bar, in 1835, was better prepared than nine-tenths of the young gentlemen who undergo that process. I was present when he addressed the court for the first time, and his clearness of statement, terseness in shaping his motion, the perfect knowledge he displayed of what he required the court to grant, and the lawyer-like mode in which he conducted himself, impressed the judge with a favourable opinion of the new called junior. His lordship leant over the bench to inquire from the registrar the counsel's name, and soon it was a familiar one in every court of the hall. Mr. Deasy's great legal learning was not destined to lie shut up in the nooks and chambers of his brain, but was soon in great request. He possesses a most sensitive disposition, and the eagerness with which he advocates the case of his clients, proves the anxiety of his mind.

He never abandons his case while an inch of debatable ground remains to be defended, and when he does yield, argument and legal skill are alike exhausted. For some years after being called, he confined his practice very much to Equity, and was a laborious reporter in the Court of Chancery. When he joined the Munster Circuit he did not soon get into practice. The distinguished men whose careers I have briefly sketched, were the tried and trusted leaders and juniors but soon as an open was made, Richard Deasy stepped in, and, once placed, his progress was sure. His ready and extensive learning, his clearness and precision, his well-known assiduity, were at once the passport to practice, and his excellence in his domestic relations, his devoting the produce of years of increasing practice to render the declining days of his parents tranquil and free from anxiety, made every one desirous of his success, and anxious to promote it. He received the honour of the silk gown in 1849, and at once was established in leading business in the Rolls and Chancery.

As a great desire existed in his native county to have a gentleman of Mr. Deasy's great talents in the House of Commons, he was requested to allow himself to be put in nomination on the elevation to the peerage as Lord Fermoy of his connection and friend, Mr. Burke Roche, M.P. His return was, however, contested, but he was returned, and sat as colleague of Mr. Vincent Scully, Q. C. As a member of Parliament he is greatly respected, and I doubt much if there is any Irish member on the liberal side of the house who commands more attention for the moderation of his views, the cogency of his reasoning, and the fairness with which he combats the arguments opposed to him, than the distinguished lawyer whose name stands at the head of this paper.

On the recent promotion of Mr. Sergeant O'Brien to the seat on the Queen's Bench vacant by the death of Judge Moore, the Irish government selected Mr. Deasy as her Majesty's third sergeant-at-law. The number of sergeants at the Irish Bar does not exceed three, and from them is usually selected one to supply the place of any judge incapacitated from going his circuit. Thus it is a good test of judicial ability, such as I prophesy Sergeant Deasy will manifest.

SIR COLMAN M. O'LOGHLEN, BART., Q. C.

Sir Colman Michael O'Loghlen was not called until 1840. He is eldest son of the late Master of the Rolls, Sir Michael O'Loghlen, Bart., and inherited a good share of his father's legal acuteness, with all his kindness of heart and urbanity of manner. He instantly became a favourite amongst us, and won every tribute of respect by his unassuming demeanour and playful disposition. His legal acquirements were soon put in requisition by the Ennis practitioners, and during the assizes, as well in the courts during term, he had a considerable share of business. He obtained the distinction of a silk-gown in Michaelmas Term 1852, and has been appointed Assistant Barrister for the county of Carlow—the duties of which he discharges to the entire satisfaction of practitioners and suitors. As a proof of the delicacy of his mind, I may be allowed to mention a fact that redounds with credit to his conduct during the early part of his professional career. Sir Colman was called to the bar while his honoured father presided at the Rolls, and it is well known this court opens a wide field of practice to the intelligent junior. Now another might not have been unwilling to profit by the *prestige* of his father's name, or the influence of a judge's connection to secure a fair start, but this was not the reasoning of Mr. O'Loghlen. He felt what was due to his father and to himself; and although his conduct in the cases entrusted to him in every court but the Rolls, showed his professional knowledge to be very considerable, he did not think it right to enter that court until his standing at the bar placed him beyond a suspicion of obtaining business otherwise than from merit alone. When death robbed the Irish Bench of its brightest ornament, and the grave received the mortal remains of him, of whom it was no less truly than pithily observed by the then Lord Chancellor of Ireland, Sir Edward Burtenshaw Sugden, now Lord St. Leonards—"Above all, he loved justice,"—when the Irish bar met to express sorrow for their loss, and take counsel how best to preserve a record of his worth, this conduct of the son was not forgotten. In the very beautiful speech delivered by the late Sergeant Warren, at the meeting of the Bar held to "express their sense of the loss sustained by the death of Sir Michael O'Loghlen,"

when alluding to that eminent judge's courtesy, he thus spoke—"If he held any partiality for any particular class in the profession, it was, as it ought to be, the junior portion of the bar; and it was delightful to witness the kind and considerate manner in which he encouraged every young man who had occasion to address him, and to see the good feeling and tact with which he passed unnoticed, or excused every little inaccuracy and error, and fixed attention upon whatever was of value to sustain the application. I am persuaded there is not one present whose grateful feelings will not bring to his recollection some instances in which he himself has been the object of his generous solicitude, and I doubt if there is a young man in the profession who has not been a sharer in it. Yes, there is one, and one alone—one whose independent spirit, and unparalleled delicacy of feeling—would not permit him to cross the threshold of his father's court, till his competence for business had been elsewhere established. One who has thus given us the assurance that he will aim at the high position of moral as well as legal eminence, to which his lamented father had so justly attained." This prophetic eulogium has been well maintained, and a manly sustainment of his opinions, an upright discharge of every duty, has been the marked feature in the career of Sir Colman Michael O'Loghlen, Q. C.

RIGHT HON. J. D. FITZGERALD, Q. C.

A young barrister, who joined Circuit about the same time with myself, deserves especial mention, for he has reached the highest place at the Irish Bar, Her Majesty's late Attorney-General for Ireland, The Right Honourable John D. Fitzgerald, M.P. Mr. Fitzgerald's legal education must have commenced when most youths devote themselves to frivolous amusements, and was certainly persevered in during his student days; for he was perfectly versed in most branches of legal learning on being called to the bar, in Michaelmas Term, 1838, then but twenty-three years of age. I was present in the Court of Exchequer during his first argument, and was struck with the cool, steady,

and deliberate manner in which he addressed the Bench, so entirely different from the anxious, nervous, frightened mode in which most young practitioners commence their career. The effect produced was such as might be expected. He succeeded in carrying his motion, to the surprise of his opponent, Mr. Walsh, who believed the Lord Chief-Baron Woulfe had decided in his favour; and Mr. Fitzgerald retired with the satisfaction of finding he had won the approval of the Bench, the respect of the Bar, and, better than either, the admiration of the attorneys, who thenceforth took every opportunity of sending him business, confident of his talents and assured of his industry. Never was confidence more safely reposed. From an early hour, often before dawn (I have heard him say at four o'clock p.m., on the last day for drawing declarations in Term, that he had been engaged in that branch of pleading since three o'clock on that morning), until late at night, has he been employed in his study or the courts. I have constantly met him entering the hall about eleven o'clock, when most of the Bar would commence their labours, having already performed a hard day's work for any other man; and those who knew his industrious habits on Circuit, need not be told of his intense application. The result might be easily anticipated. His progress at the Bar was unexampled for rapidity; but can any one say it was undeserved? His promotion was such as his diligence merited. He retained, by his professional conduct, the respect and confidence thus early reposed in him. Ever fully master of his case, he never was at a loss either for facts or law. All branches of jurisprudence, law, and equity, pleading in every form, the laws of bankruptcy, criminal law, nothing was too minute to escape his vigilance, or too large for his comprehension. He soon rose to eminence in the Four Courts, and from the first start got into Circuit business. I have heard of his making some fifty guineas by civil bill appeals alone, at a single assizes in Ennis; and I have no doubt his harvests on Circuit must have been immense. When only nine years called he became Queen's Counsel, after seventeen years Solicitor-General, and on the promotion of the Attorney-General, Mr. Keogh, to the Bench of the Common Pleas, became Attorney-General, then not more than

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eighteen years at the Bar. For several years he has represented Ennis in the House of Commons, a most efficient and excellent member of the liberal party.

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It is time to close these "Recollections," though my note-book is far from being exhausted. I trust they have afforded some harmless amusement, and are regarded as not without use to the members of the Bar. I have done my best to preserve the names and fame of those who, by their talents and learning, overcame various obstacles, and raised themselves from the position of juniors to the high eminence of the Bench, or the responsible position of leading counsel. I trust I have done so without causing a word of censure or regret to be pronounced upon these brief words. Some errors I have committed, but they are readily seen, and not very important. There are many names of excellent and distinguished members of the Circuit, which I have been compelled to omit; not from any want of respect to those who bear them, but as my jottings were very desultory, when I came to prepare these papers for insertion in the pages of the *Law Magazine*, I found I had no materials at hand enabling me to construct a notice with. If my "Recollections" are approved of by my dear brethren of the Munster Circuit, I shall feel very sincere pleasure. They have ever shewn me, one and all of them, the greatest kindness, and I trust nothing has escaped my pen to make any gentleman of the Bar regret having done so.

My task is done—my tale hath ceased—my theme
Has died into an echo; it is fit
The spell should break of this protracted dream—
The torch shall be extinguished which hath lit
My midnight lamp; and what is writ, is writ—
Would it were worthier!

ART. VI.—OUR LEGISLATIVE PREDICAMENTS AND PROCESSES.

OLD Father Thames, resenting the negligences of our British statesmen, has given an unmistakeable exemplification of the courses pursued generally in British legislation.

Ever intending, ever proposing, ever beginning, never ending, the English legislature accomplishes nothing, either connectedly or completely. "A mob," as Cobbett designated it many years ago, without organization, it can neither originate nor receive propositions, or if it receive them, it cannot entertain them, if they be not of the simplest.

Father Thames, with resistless importunity, claims our first thought. Three years ago an Act was passed constituting a metropolitan representative executive body, to dispose of all matters of local concern, and, among others, to provide for the removal of the sewage of London, without tainting our great river.

To ensure the control of Parliament, it was ordained that this costly and difficult work should be subject to the approval of the minister, Chief Commissioner of Works, a secondary minister, subordinate to the Secretary of State and to the Treasury.

The statute contained a provision for reporting matters to Parliament, but no provision for Parliament taking such matters into consideration.

But nature, more entire in its operations, has provided the responsibility in which our legislature has failed ; and attention has been awakened by the distressful stinks of this hot season, and the threatening consequences of neglect.

Since, however, the evil has come upon us, through want of appropriate and continuous agency, duly responsible, there is no means, in this the best possible of all constitutions, for dealing with an emergency that forebodes the decimation of our population in the metropolis, the very heart of the empire, and the seat of the national power.

The British constitution is, in point of fact, in its present

state, a mere supposition. It is a brain softened and incapable of will. In no one instance in modern times has it been found obedient to the call of any emergent purpose ; and its fatal recusancy at the moment of need, following on its unconstitutional negligences for a long antecedent period, has been attended by the calamities of the Crimea, of India, and of this the present dire threatening of plague and disease.

At this moment we have under consideration, in some form or other, upwards of one thousand matters—fragments of larger masses of statesmanship, which statesmen, worthy of the name, would present in groups, and in a form susceptible of easy solution.

We take hold of the very fringe of the garment, and it eludes our grasp at the slightest pull against us. We account ourselves fully and happily employed, if our time be filled with talk and discussion, and if we can recount at the end of the session a number of bits of legislation, dealing with subordinate matters in an incomplete manner, which at a few more turns of the legislative wheel, must make way for some amendment, that a little foresight, or even thought of past miscarriages of the like sort, might have spared us.

The matters recently under notice are but samples of the multitude of questions under consideration ; a crowd of sick importunate mendicants at our door waiting for relief, often promised, and as often denied ; most of them sick from the very same causes, which, by a few strokes of the legislative pen, resolutely applied, might be effectually cured.

What a sad spectacle has the Parliament of Great Britain presented this very session on the discussion of several questions of constitutional organization, betraying an ignorance of the very framework of the constitution as it is, and of the natural essentials and inherent conditions of any constitution at all ; advancing different principles and methods on different occasions—requiring the same method of treatment, and failing in every one. Thus, on the Indian question—on the Local Government question—on the War Department question, the Parliament has been equally at sea, and will produce, as it did in the Metropolitan Local Government question, an inevitable miscarriage.

These consequences are due to the ignorance, by our states-

men, of all that has been done before, or elsewhere, and of the attendant successes and failures ; to the inorganization, not to say disorganization, of every one department of Government ; to the inorganization of both Houses of Parliament ; to the want of means to institute, conduct, or receive and sanction, with due knowledge and consideration of the correlate parts of our system, the several legislative propositions presented to it ; and to the want of power to execute its main function of superintending and controlling the working of the different parts of our official system, and supplementing them when deficient.

The characteristic defect of the House of Commons is the usurpation of all the functions of Government, with the desertion of all its own functions—the handling of every thing, and the bringing to complete practical issue, nothing. It is a political battue, where every thing is shot down without much regard to the consistency, the permanency, the adequacy, and the efficiency of that which is to be put in its place.

Instead of imitating the providence of the Great Creator of all things, who for every needful work has provided a suitable agency, it ignores learning, eschews doctrine, scouts technicality, abhors the past, disregards the example of other nations, refuses to foresee the future, adopts every conceit, conceitedly urged on its attention, and resolves all questions by counting noses !

If our advice could be heard, we should say, "Disregard no petition, despise no aspiration, but, like men of business, let us take advantage of all the wisdom which past ages have accumulated for our aid ; let us adapt it to our present wants, let us summon to our aid every ability that the multiform nature of our work requires, and concentrate the effort of the nation, by consolidating our forces, and bringing them into harmonious action, under the presidency of the best available statesmanship ; taking care that the best statesman, who, after all must, by the very nature of things, be a being of partial powers, is supplemented in all those aspects in which his powers are wanting, in scope, completeness, and efficiency."

We have for so long urged these general considerations, that we should deprecate the reiteration, if recent events did not warn us of consequences that would be irreparable if not breasted in time.

Do not let the Conservative, the Whig, or the Radical, conceit himself that he is not the wrong-doer. We believe that every statesman, without exception, is grievously in fault in this—that he has failed to supplement himself by the welcome recognition of all others competent to give him aid; and has spent opportunity and public treasure in childish contention, instead of by a masterly exhibition of statesmanlike measures, constraining all others to fall in with the national wants and will.

The petty conflicts of small partizanship has taken the place of statesmanship, and they who should have been leaders from pre-eminent ability, from being long conversant with affairs, are incapable of leading; for by the narrowness of their arrangements, by the exclusion of all ability but their own, in Parliament, in office, in the closet, they have created internal disputes and rivalry, instead of meeting the world with a compacted force, composed fairly of all the powers of the state, and strong from its consistency with the national feeling.

But the greater cause has been the neglect of the office and the workshop, in Parliament and in the departments of state. They have failed to prepare their measures, to reduce them into form, to ascertain the law, to ascertain the information and opinion that obtains among the people, to consolidate their tribunals, to consolidate their law, and to provide as well as to economise the financial means, to energize the special enterprises they undertook, after a careful and accurate solution of them, to give to all localities their appropriate action, institutions, and representation, and to crown the whole by adequate public authorities of a general kind, conformable to, and efficient for, their purpose, without trenching upon the limits of other jurisdictions.

It would be well to note by means of a few examples, elaborately demonstrated, how the present state of things works—to note specifically in such cases the defects or grievances of which we have to complain; to ascertain the expedients that are already in use somewhere or other, or that have been suggested by experienced and thoughtful persons; to select the expedients that are immediately available, and those that we may look to have in an ulterior stage; and finally the ultimate object of our fair aspirations.

Better it would be after such preparatory effort, to frame the

practical propositions that may be adopted at once, and having regard to our immediate predicament of legislative inadequacy, (to use a mild term,) to select the propositions that might be adopted for the regeneration of our statesmanship, for the regeneration of our legitimate party action, for the regeneration of our political system at large, and its due subservience to the legitimate action of public opinion.

We may rest assured that the chronic state of British statesmanship, and its administrative and legislative inadequacy, is due to some cause not on the surface. We think it is a general misapprehension of the position, an universal self-seeking of measures after our own fancy, and the want of institutions of a permanent and well-organized character, to give energetic effort to the policy of able statesmanship.

On former occasions, having regard to that interest which the condition of our own specialties gives to us in the state of the general machinery and working of our institutions, we have touched upon these and cognate topics.

On those occasions, we have observed on the multitude of matters under consideration, on the embarrassments thereby caused, and on the means of disposing of such matters in a masterly manner, by grouping them in convenient cognate masses, and referring both to their appropriate executive agencies, and to suitable committees of the State Councils, great and lesser, the Parliament on the one hand and the Privy Council on the other; and also by our leading and other statesmen, each taking up one entire contributory portion of the whole mass of neglected business, or one phase of legislative considerations, and by an exhaustive treatment of it, mastering the correlation of the theoretic or doctrinal, and the practical or business-like considerations and conditions of public business, and the possibility of reducing the whole mass into some one convenient form and order, of a comprehensive, and at the same time (because comprehensive) simple sort.

The painful experiences of every statesman must point to such a course as not simply desirable but of absolute necessity.

The great men among us who are accounted statesmen, and the Parliament who seem to be entirely at issue, and to have no bases of principle whereon to act, or whereby to select better

lines of policy, or choose better statesmen, or leaders, would be led by a simultaneous action of this sort to the adoption of a good sound practical course.

It is in vain for any body to say we want leaders, or there is no statesmanship among us—the best manner of obviating the defects of statesmanship is to unite ourselves by means of appropriate organization, as one man; and to give in charge to each one of us the ascertaining of all that relates to any one business, with liberty to discharge it as best we can. The sense of deficiency on our parts will lead us to have recourse to aid wherever it can be found, and this will bring us infallibly to the discovery of the man, or men, who have, in the highest, or in the most appropriate degree, the faculty and forte of leadership. Let each man be leader in his own cause, if he will it so, but if he desire aid in that respect, let him choose whom he will to be his leader in that matter. The man who is so selected in the greater number of instances, is, in point of fact, the man fit to be leader in all. This mode of selection is that which has been practically adopted at the bar, and has been found successful. It may not have thrown into the first place the most informed man, the most sagacious, or the most able councillor, and rightly so, for this purpose, for such men are seldom, if ever, fit to be leaders; indeed they mostly lose what merits they have when they are put in the position of leaders. They lose confidence in themselves, the faculty of giving the best advice, the decision of what is for the moment. Their apprehensiveness is fatal to practical decision in action; the apprehensiveness which makes the best councillors under cover of a man of action fit to take the field, makes them, in such a case, very cowards. Their forte results from intellectual capacity, purchased at some expense of the physical, therefore we urge that men fit to be leaders, should, as all great monarchs do, supplement themselves by that other order of men, advisers. We are not only in want of leaders, but in want of advisers—of men who are able to bring to our view all considerations pertinent to the matter in hand on the occasion. Practically, the government of a party should be on the same model as the government of the nation; it is the government of the nation with a difference—a difference of feeling, a difference of method, a difference of some

sort, which being recognised by the majority of the national Senate, leads to the substitution of one party hitherto out, for the other party hitherto in.

This principle of governing the party that is out, by an organization and method corresponding to the organization and method of the government itself, is an essential condition of real parliamentary and legislative success. Acting after this method, and with a small official force, to give routine and even mechanical regularity to the operations, the organization which we call party, would be generated by a sort of natural process, founded upon mutual interest and assistance, and the habit of acting together would beget a habit of mutual support, that would render the services of whipper-in unnecessary, or at least of a very light kind.

Doubtless, there are considerations of some delicacy to be regarded. It will not do to recognise any man as the proximate this, that, or the other; and some matters must be done by committees, leaving open the selection of individuals for particular posts, when the actual leader of the government, selected by the Queen, is charged with the duty of forming a government. In the meantime this competition and probation of our public men, will not be without its use in showing who is a mere pretentious speaker, and who, to the faculties of the orator, adds the sagacity and the capacity of the statesman, and the hardly less important duties of the administrator and man of business.

At all events, all the operations of the whole body of politicians of the same party, should be founded on some principle or special purpose, in no greater degree divergent from the general constitutional arrangements than is requisite for realizing the desired difference.

Thus the opposition would be consolidated, and tend to consolidate the statesmanship of the country. The diversity of purpose and means would, by a natural and convenient process, be duly restricted. As it is now every one of the measures that have been propounded, seems to have issued from a different mint, and to have been addressed to a different body. It is as if our constitution had no general framework and scope, and as if the machinery for the conduct of affairs was wholly independent

of a common purpose, a common nature, and common ends ; and as if, when matters were determined upon, the execution was to be left to blind chance, and our legislators were wholly irresponsible for the faithful working out of their decrees, and bound to take no thought from session to session of the results, but simply to go on year after year adding fresh orders to the past, in utter mindlessness as to their congruity with what has already been done, with what is doing elsewhere, and with what must follow *seriatim* on their present doings.

The energies of the nation—of the public part of the nation—are expended in talking and writing. It does not hesitate to commit itself, without design, without purpose, or malice aforethought, to the greatest enterprises, regardless of its means, and regardless of the limits of its opportunities, and the losses that by delay ensue to successive generations of the people, whose fortunes and happiness are dependent upon public action.

These are not vague words or idle declamation.

The present session teems with examples of the truths of our position, only more glaringly anomalous than the like cases which have happened within our observation and experience for many years past.

Upon the instances there have been, and there will be, much comment and angry discussion amongst political partizans and the quidnuncs of the day ; but our task is less with the instances than with the causes, and with the means of obviating the recurrence of like disasters. We desire to aid in preventing this great nation drifting into a state of ineptitude, rushing heedlessly through an accumulation of debt and difficulty, into a state in which it may be the prey of rival and ambitious states, jealous of our success, and not altogether unjustly irritated at the tone which at times we have assumed towards them. We desire to point out how with legitimate conservation of the main institutions which we have, we may realize progress, and moderating (not by ignorance of any, but fair recognition of all) the pretensions of all parties in the state, may consolidate the empire, and this not by idle or wild aspiration, but by a close and businesslike attention to the details and particulars of our operations, and by ordering these operations

upon design in subservience to a well-founded policy, which has regard alike to public freedom and to public authority.

We know that many consider that we have already worked out and established all the great principles worth contending for, and that there is nothing left for us but details, which are scarcely deserving the attention of statesmen and orators. This is our rock, not of defence but of destruction. All detail is principle realized. All art is science embodied. The principle, the science is worthless but for speculative dissipation, for high intellectual amusement, if it be not realized or embodied in a shape to produce practical results, the happiness of mankind, the strength and duration of states, and the actual progressive amelioration of their peoples.

We grant that to make details worthy of contemplation and effort in this sense, they must be grouped, massed, energized in obedience to high purpose and policy, each part being carefully adjusted in reference at once to its own purpose, and to the common purpose, and to the relative purposes of all contributing details; and the whole so designed, constructed and adjusted symmetrically, that the value of particular details is lost in the sense of the perfection of the whole. And so, having adjusted our details into a god-like scheme, we must have our workmen instructed, trained, examined, and proved, and by suitable engagements, each in his sphere of utility—proud of his work as contributing to a common good—not in small partizanship, with feline bitterness, snarling in angry conflict about some small success, some petty claim to have done this or that little thing, while the whole purpose, the whole work, is lost to view.

The art, then, of conducting our affairs in all its departments, public and private, in the cabinet, in the senate, in the field, in the court, in the office, in the assembly, in all places, and at all times, is a matter of high policy, deserving instant regard by all among us who are accounted great, or who account themselves great.

Let us, instead of speakers who, in grandiloquent or voluble phrase, with rounded voice, and on their legs by the hour, dilate with tiresome exposition on the work before them, seek those who, by well-framed resolution or instruction, and by concise exposition,

bring into view in clear and well-connected order, the outline of policy and means, reconciling extreme and intermediate views with each other, and with at once the common-sense of the people, and the profound sense of philosophers and statesmen.

Here is work of principle, worthy of the greatest minds and energies, and as feasible as worthy.

By welcoming all propositions, by ascertaining their particulars, by assimilating them to a common standard, both of form and purpose, by developing them in all particulars in which they are deficient, by expurgating them of all particulars in which they are excessive, and by amalgamating the whole in one comprehensive measure, all the petty differences are lost in universal assent, and the principle of wholeness, and of general adaptability is obtained.

Our difficulties spring from sheer want of such management, from want of sovereignty among the people. Our statesmen have usurped the sovereignty, and not supplied by fit arrangements its substitute. Hence we are a people and not a state, a community without leadership, an association of associations, an aggregate of individuals without constitution or government. Our governmental departments, and their dependent offices are "a fortuitous concourse of atoms," and so are all other bodies and associations among us. Wonderful things have been done by them, not indeed by virtue of their fortuity, but by virtue of the general spirit of freedom among us, and the rough and ready energy with which we cope with every difficulty as it arises, without regard to cost or consequences.

But this cannot go on—by the same facility with which we can reach every part of the world, every part of the world can reach us. Other nations are acquiring, with such facilities, habits of free action and free commerce, in spite of the trammels of their governments (which are constantly moulding themselves in policy and action to the new conditions of things, although they retain the ancient form).

All the nations are in fact acquiring the same intelligence, the same dress, the same habits, and becoming one cosmopolitan race, and less and less disposed to recognize in one another any superiority, and more and more disposed to aid their governments in maintaining their individuality and *prestige* against all rivals.

Our wall of isolation is broken down—we must consolidate ourselves into a state, in order that we may cope with, or be on equal terms with all other states.

We are becoming more and more amenable to the responsibilities of a state—less and less able to assume mastery on the strength of mere *prestige*. We need, therefore, to marshal our internal forces, to compact them into a whole, constitutionally governed indeed, but on clear, well-defined principles, not on mere vague inference.

Each entity entering into the composition of the great entity the state, must have its uses, and its uses must be its purpose, and its condition must be conformable to, and efficient for, its purpose.

The sovereign and all the royal family, the peers and all the nobility, the commons and all the commonalty, the privy council and all its members, the tribunals in all their parts, the departments of state and all their offices, the communities and their municipalities, the professions and their members; every entity in short, must, by the very law of competition and progress which prevails, be itself, what it pretends to be, conformable to, and efficient for, its purpose.

While some are supposing that the struggle in modern times is between royalty and democracy, it is, in fact, between reality and pretence—between promise and performance; and the decree has gone out, in fact, against all mockeries and all conventionalities, that are formal semblances, and not realizations of what is naturally fit in our present circumstances. This change is going on in spite of the forms of government, and the task is to bring government into harmony with all other things, and all other things with one another, by making each and all conformable to, and efficient for, its purpose.

It is of no use for the people to rail against the peer, or the peer against the people, or one class against another class; each is in the wrong by its antagonism to the other, and all must be got out of their difficulty by appreciating one another for what they are relatively worth, and by winning their own position and *prestige* by showing in what they are themselves worth, by being conformable to, and efficient for, their purpose.

The principle is not a principle of exclusion, but of comprehension ; not of partisanship, but of wholeness ; not of diversity, but of unity, comprehending all diversities ; not of restraint, but of free action and free discussion ; not of the past, but of the present ; fit preparation for the future, by a wide contemplation and due regard for the experiences of the past. The course is not to disparage this or that party, this or that statesman, this or that sect, this or that little bit of philosophy ; but by sovereign, god-like, masterful leadership of all, to make each heartily contribute to the common cause—the welfare of the state.

Never mind from what quarter the good comes—collect every fragment, despise not the smallest contribution, and the whole will be satisfied and fulfilled.

But how to do this? by plain, practicable, feasible, accessible human means ; by organization of our forces, by the consolidation of our institutions and our laws, by the *scientific* collection and recordation of all the information that we possess, by a statesmanlike provision and economization of all resources, and by the employment of all the assistances, official and other, that we possess, within the scope of their capacity, and within the sphere of their jurisdictions.

We want government in its true sense ; a notion of the necessary means of government, constraint by the common public opinion, informed and chastened by the promulgation of our common knowledge and common views.

Let us descend from generalities to particulars. Let us regard the matters presently before us. Let us look “ at the dainty dish before the king.” Let us delight our senses of sight and smell with one of these much-vaunted blessings of our nation and constitution—the Thames, which has descended to us from our ancestors—which in spite of all its blemishes is a blessing we cherish. Let us see what our ages of statesmen have done for us. Let us appreciate the predicament. Let us consider the processes by which we may escape it. The welfare of millions now and to come is involved in the issue : whether our posterity shall be a healthy, wholesome, stalwart people, or a weak, feeble, diseased race, is the question. Second to this, How shall the work be done? To whom shall we commit it? By whom shall it be

paid for? How shall we retrieve the blunders that we have made? How provide against their recurrence? These are questions not singular. They apply to the thousand and one measures under consideration. Resolved for one case, they are resolved for all. The same principles, the same purpose, the same agencies, the same means, are equally applicable; the forms which they assume, the costumes with which they are covered, the language with which expression is given to them, in one place and another may be different, and may so convey to our minds a notion that the things themselves are different; but in all essentials they are identically the same; and a mastery of the one will enable us, with but a little clerical skill, with a little ceremonial ability, with a little statesmanlike craft, to master with equal effect the rest.

We dwell upon this principle. It is of the last importance, for it is a principle of universal application and of as universal neglect. We sometimes assume that because things are somewhat different their treatment should be entirely different. We sometimes assume that because men's prejudices and feelings are to be regarded, we must pay no heed to the views and feelings which they have in common with ourselves and others. We refuse then to lead them, in amicable diplomacy to consider what we have in common; and after due deliberation to frame a common plan with modifications suitable to each; modifications which will be less and less divergent from the common plan, as we attain a common understanding of the whole matter, which we shall do with more facility if we show that we are willing to consider the systems of others as well as our own, and try them all by the common purpose to which they are cognate.

The practical agencies and processes by which such ends are to be attained, must be a principal subject of this paper: treated, of necessity, summarily and in brief, because our space is limited, a matter perhaps less to be regretted, for the topics of the last session have ripened, in a singular degree, the public mind for a consideration of these subjects, and have furnished so many striking illustrations of the necessity of doing something to get out of our scrape.

Of such a character has been the great Sewage question, the India question, the War Office question, the Local-Gov-

ernment question, the London Municipal Corporation question, the Consolidation of the Law question, and a host of others.

We had intended to make a few remarks on some of them by way of keeping alive in the recollection of our readers, some of the salient considerations pertinent to our present subject, but time and space forbid.

Perhaps no minor or subordinate question can be solved satisfactorily till we have unreservedly and faithfully answered this. To what are we to attribute the present disintegration of the constitution? our answer would be, To the exclusion of some elements necessary to the complete comprehensiveness of the entire fabric—to the pressure of claims strengthened by the sympathy of a portion of the politicians within the pale—to the practical responsibility engendered and enforced by the recent events in Europe and in India. Till now, we have been governed by *prestige*, which has been falsified by events, and, hurt by the discovery of the falsehood, we are angrily setting at nought both persons and things that existed under it, unmindful of the possibility of supplying their place without more training than there is time to give.

Our condition as a state in relation to other states, and our condition as a people, in relation to all classes and conditions of people, are matters to which we are becoming excitedly alive.

The social state of individuals, of households, of families, of classes, of associations, of communities, and of the whole people; their education and discipline, the administration of affairs, public and private, the internal disputes of the Liberals, the internal disputes of the Conservatives, the polemics of the Conservatives and the Liberals, the advancement of the claims of every class, and the recognition of the common interests of the whole people, have come upon us in thronging force, without time or opportunity to adapt our public action to the overwhelming demands upon us.

There is neither chieftainship nor organization to deal satisfactorily with these subjects, and nobody can point out the persons capable of doing the work. Probably the preparation must be found in the present seething state of political existence, which will at once ripen the matter for proper treatment, and suggest a course to be pursued, and, may be, train the leader to deal with it.

Evidently, it must be some man acquainted alike with the caprices and contradictions of the English character, with the subtleties and mysteries of the constitution, and with the traditions of the past and the hopes of the future. If we cannot find in any minister all the qualities requisite for the post, we must supplement him by others. If we find in a Palmerston, administrative but not legislative genius, and in a Russell, legislative genius and not administrative, we must assign (in obedience to the exigency, and for a time) the one to the chieftainship of legislation, and the other to the chieftainship of administration, and to each give subalterns with the requisite qualities of intelligence, boldness, energy, and capacity, for dealing with details with the mastery of genius. Not affecting to dispose of such high matters, we offer the suggestion as an illustration of the manner in which the partial powers of distinguished persons, may be turned to the common account, by putting them in the right places with full recognition of their peculiar capacities. We must, in homely phrase, cut our garment according to our cloth, and take such leaders as God has given us.

Our true difficulty arises from not having any sovereign selecting power in the state ; in default of which we must have a rule or law of public service, both in the administrative and legislative capacities to which all may conform, and thus work out a practical result with as little leadership as possible. Perhaps after a time we may, like the bees, hit upon a plan of selecting leaders that may get us out of a difficulty that is of imperial magnitude, warranting great apprehension, and demanding anxious care. Hitherto, in this article, we have been treating of this subject in general ; but it is now time to speak of some of the particular means of remedy—how we may so order matters as that all shall have fair play, and that, without subjecting the members to needless drudgery, they may in the natural course of things become cognizant of every thing that is submitted to their decision, and may, by some convenient arrangement, ensure not only attention upon each matter, but, in due time and with due consideration, a determination thereon.

A vast deal of time is lost at the very threshold, which is very discouraging to many members more disposed to be useful than

pretentious. If a member desire to introduce his measure properly, with a fair exposition of the subject, he is worn out with waiting, and is often compelled to introduce it at a late hour of the night, without giving fair intimation of its scope, but reserving that for a later and improper stage, which has its own special uses.

The following table will show the working of the existing arrangements of our legislative laboratory, the House of Commons, in a matter of technical legislation of no immediate public interest, such as the consolidation of the criminal law, proposed and introduced by the Attorney-general:—

Notice of motion for leave to bring in his bill,	May 20 to June 3.
Deferred from	June 3 to June 4.
Deferred from	June 4 to June 17.
Deferred from	June 17 to June 18.
Deferred from	June 18 to June 24.
Deferred from	June 24 to June 25.
Deferred from	June 25 to July 1.
Deferred from	July 1 to July 8.
Deferred from	July 8 to July 10.

Here we have eight postponements of the very initiatory stage. The first law-officer of the Crown in the House of Commons is compelled to stand, cap in hand, without being able to obtain the opportunity of introducing his measure; and those persons and functionaries upon whom it is incumbent to watch such measures, are kept in abeyance during this period of suspense. Manifestly, it would have been more advantageous to the subject that the measures should have been introduced—that they should have been printed—that opportunity for consideration should be given to those who are interested in such things—and that the House should approach the second reading with a full apprehension, by the legal and other members of the House, of the scope of the measures—of the scheme on which they are framed—of the objections entertained with regard to them as to the structure, the matter, the ordering of the matter, and the expression, verbal and typographical; and that, after a full recognition of the principles which ought to obtain in such things, the measures should be submitted to a committee, to ascertain how far those principles have been properly

realized to the extent to which they are applicable, and the means at hand are available. In every transaction of life, success is due, not only to the right preparation of matter before it is submitted to the body referred to, but to the preliminary action of the body before it proceeds to deliberate and decide.

Such a course eliminates a mass of objection, founded on imperfect views and hostile partisanship, while, if denied, angry feeling is engendered at the supposition that it is proposed to take advantage of one, and deny the needful opportunity for fairly understanding the subject. It seems to us to be expedient to give, at all events, to the executive government, the representatives of the majority of the House, the right to submit its measures at once without special leave, as the House of Lords, indeed, permits every member to do.

It might not inaptly be made a condition, that every such measure should be accompanied with a succinct statement of the object and occasion of the measure, sufficient to put every body on their guard ; and then, if no objection should be taken, it might proceed as unopposed. It is obvious that, if we are to make way in a regular manner in the work of legislation, we must not only appoint a minister or department of justice, but also make better arrangements within the House for the due ordering of the business.

By way of setting on foot some practical action, we would suggest a course after the sort we shall shortly mention in furtherance of like suggestions which, on former occasions, we have made, for facilitating the work of legislation.

If we would have our vessel navigate well, we must withhold none of the conditions of success. The hull must be built on a good model, and every appliance must be found; without this we may man our bark as we will, with the most excellent craftsmanship, it must founder and all our pains be lost.

Of what use to have law-officers of the most splendid abilities, and energy of character, if our contrivances are such that they have no scope to apply those qualifications?

This, however, is the scheme we adopt in England:—

We give our law-officers many thousands a year, and hold them of no more practical account than the least among the

members. We do not give them a day, nor any welcome recognition, but treat them as bulls to be baited, rather than ministers of our own efficiency.

On a former occasion, we suggested that the law-officers of the Crown should be paid specifically for their attendance in parliament, and for their legislative work, and that in order to have some claim upon the out-going law-officers, especially those of Ireland and Scotland who lose their business by attendance in parliament, we should grant them pensions.

We proposed that, for the sake of conducting in a regular manner that mass of business which is of a formal and unopposed character, a particular period of each day should be set apart for taking bills in a given stage, and that where no objection has been made, the bill should pass that stage of course.

It was proposed, to facilitate work, that bills should be referred as of course to committees charged with the cognizance of the matters of which they consist, and be subjected to their scrutiny. If no objection occurred to the committees, the bill might, as we have said, proceed as of course.

To facilitate legislation, it was also proposed that bills should in all cases be moved on resolution as to matters of principle; and matters of detail, of a novel or peculiar character, should be disposed of by way of instruction.

The following suggestions mark out the course of procedure.

That every member be of right entitled to present to the House, without speech or motion, a legislative report of the state of the law, on any matter that may seem to him defective; such report consisting of a statement of the law, a statement of the grievance, a statement of the expedients in use, a statement of the expedients available, a statement of the matter of enactment.

That, on the presentation to the House of any such report, it stand referred to a committee of petitions and reports.

That the committee of reports and petitions refer the same to the general committee of inquiries, or any committee having cognizance of such matters.

That if to the general committee of inquiries it appear that there is matter of grievance, the bill be referred to a committee

of resolutions and instructions, to prepare proper resolutions and instructions.

That on a day to be appointed for the consideration of resolutions and instructions, the member move such resolutions, &c.

That if the House adopt such resolutions and instructions, the same be referred to the other House of Parliament or to the committee on bills and statutes.

That on the receipt of the resolutions and instructions, the committee on bills cause the matters to be prepared in due form to be imported in any general sessional law on the subject, or in a special bill, as to the committee may seem proper.

That the committee on bills immediately refer the provision to any special committees having cognizance of the subject.

That if any objection be taken on petition, or on the suggestion of any member, the chairmen and clerks of the committees take cognizance of such objections, and report them to the House, with the views of the Committee thereon.

That if no objections proper to any stage be taken by any committee, or by any member, or by any petitioner, the mover of the bill be entitled to have the bill passed as of course at that stage.

That proper officers of the House be charged with the revision of bills, and bringing all matters required by the standing orders to be noticed, before the House at the proper stage.

Such a method would tend to make our legislative operations more business-like, and at the same time more scientific, and after no long period the principles would be established in practice, the measures would be fewer in number, more consolidated, more constitutional, more complete—and not so full of blunders and inconsistencies, necessitating fresh accumulations of incongruous and unpractical legislation.

We see no reason why the statutes of a session should exceed a very limited number, nor why they should not be like the customs and excise supplemental acts, repetitions of one another in structure, and so written that the fresh matter may be pieced on to the old without disturbing the existing fabric, and without presenting any obstacle to fresh incorporations of new matter, written with like regard to the framework of the then existing law.

But to do these things we must be prepared to submit ourselves to the exigencies of the case, and to sacrifice our personal vanity and our prejudice to the common advantage and the manifest requirements of the subject.

Our great statesmen, who suffer more than any by the present state of things, and our great lawyers, who, from the same cause, play so small a part, would do well to bethink themselves of the subject, and giving heed to those who have counselled and warned, and importuned, try for once, to become masters of their position. A little less sleep, a little less slumber, a little less folding of the hands, a little less listlessness, a little less ignorance of the smaller aids, and a little less presumption would help to maintain positions so hardly won, so easily, so unworthily lost.

A great workman, a master mind, plans his arrangements and exhausts all appliances; he knows how trivial an omission may defeat a great enterprise, how small and insignificant a person may thwart a far-reaching policy, if every step have not been made sure.

But to do this well, we must have a basis, a recognized state of our law, a recognized state of institutions, a recognized manner of dealing with grievances, with the petitions that announce them, the substituted provisions in the shape of bills for obviating them, and an end and aim with which at least the majority of institutions for the time being, whose counsels and consent are requisite, coincide.

Such a basis would be afforded by the consolidation of the law, by the organization of the civil service, by the internal reform of the House of Commons, in regard to its committees, and in regard to the procedure of legislation, and by affording to Government systematic aid for the preparation of legislative reports and measures, and to Parliament, the means of revising current legislation.

It is in vain to attempt, with hopes of success, any one of these measures. Each must be given in full force, and be so arranged as to be contributory to the success of all the rest.

The grand quarrel of the liberal party with its leaders, and the present hopelessness of a reconciliation with any practical advantage, arises from the common disregard of the state of business,

and the means of disposing of it ; a fault shared by every body, by followers as well as leaders, and by leaders as well as followers, they not only persist in having in their regard the opposite representations of the shield, but they will not even have bodily before them the very shield itself. Nobody seems to have the impartiality, the moderation, the wisdom to collect the contending claims, to bring them together in parallel, to order them in the degree of their assumed importance or practicability, and take the sense of the main body as to the order and manner of dealing with them.

Nobody seems to be aware that the true predicament is the necessity of taking stock of the common wants and wishes of the people—of the respective abilities, claims, and indispensable qualifications of the different statesmen, both within and without the pale of parliamentary and official cognizance ; and, moreover, of the necessity on the part of every body to recognize, in some sort, the traditions of Europe, and the means of conciliating the comity of Nations to a common purpose of mutual support against the wrong-doer to the common peace of nations.

Lawlessness in nations as well as lawlessness in subjects is the common evil to be obviated by unceasing care, by the combined aid of fear and love, of force and good will.

Of fear and force we can have none with so much internal distraction and so little recognition of a constitutional existence of any sort. Of love and good will we can have little, if, despising the independence of others we perpetually fling at them our own independence and our own superiority in all things.

This state of things is due in no small measure to the unstatesmanlike character of our lawyers as a body. Few study international law, or constitutional law, nor jurisprudence and legislation in their higher scope and conditions.

Our finance is mastered because successive Chancellors of the Exchequer are permitted and indeed required to produce an annual budget ; and, by the changes which take place in administrations, there have arisen a body of Ex-chancellors of Exchequer, and Secretaries of the Treasury, able to deal with finance both in principle and detail.

Not so with our constitution or with our law. Our efforts are

casual and empirical: and the lawyers are at more pains to contest a detail than to expound a scheme of policy.

It has been suggested that it would be a good thing, if the lawyers of the house, as a body, would treat law measures, as the Scotch members treat theirs: if they would meet, exchange objections, and come to a sort of understanding as to the general course to be pursued.

For instance, it might be agreed that the Attorney-general should, on an early day in the session, bring forward a budget of measures affecting personal rights, proprietary rights, commercial rights, professional rights, and suitors' rights, tribunals, procedure, pleading and forms. These like Customs acts should be framed after a general fashion—following the order of the consolidated law on the same subjects.

In his speech, he would necessarily mark the relation which they bore to the existing law, and the topics would after a while be habitually considered on principle by members, both legal and other.

The measures so introduced on resolution, as in the case of the budget question, might be referred immediately on the first reading to committees, on which the lawyers could attend; and the lawyers could also meet as a body to arrange the reception and manner of treating objections.

Any body who has watched the facility with which financial measures so introduced pass the House, would recognize at once the advantage that would follow the same manner of introduction, and the habit of treating cognate questions collectively or in groups.

Doubtless the commencement of the new practice would be attended with difficulties; but as it is a matter of common interest to the profession to adopt some such improvement, we might count upon a great degree of indulgent concurrence in the first stages of the experiment.

Certain we are that a minister of justice will be of no value, unless both a better method of introducing law business, and a better method of entertaining it by the House at large be adopted.

It is childish to suppose that Parliament will ever delegate to

a separate body like the statute-law commission, the dealing at large with the law. After a time perhaps, when, by a better method of proceeding, all parts of legislation had acquired a routine character, the House might accord a confidence in a strange body, acting responsibly and publicly, to the extent of the secondary matters.

With a minister of justice—himself responsible, acting as a medium between the House and such a body—such a state of things might be brought about more quickly.

But the basis must be found in the consolidation of the existing law, in a practical form, enabling every body to see as in a chart the position and bearing of each part of the law, and the probable effect of introducing any modified or varied provisions.

Nothing is so calamitous as the bit-by-bit style of legislation, groping in the dark—in ignorance of the law that is—in ignorance of the position which the law is to take, and still more in ignorance of its effect; doubling the effort in itself, and quadrupling it in the successive attempts to amend the bad beginning.

Here is a common evil requiring common recognition and assistance, in many different forms. Each member of the community may perform his part by bringing to view that portion of it from which he suffers, and may present it to his representative in the courts of justice, the Grand Jury, or to his representative in the town council, or to his representative in the county council, or to his representative in Parliament. If any one asks who is my representative, the answer is, that person who in any such case represents his locality. Such representative is bound to bear with him such representations, to bring them to the view of his fellow representatives, and to hold council with them as to the best means of meeting them.

The executive officers charged with the assistance of such councils in the preparation of their measures, in the conduct of their proceedings, and in the execution of their decrees, are bound to take cognizance of such representations, to reduce them into the form most convenient for the disposal of them, and to assist in the adjustment of the decrees to the existing institutions, or to modify the existing institutions, so as to make them available for the beneficial purpose.

The 654 representatives charged with their budget of grievances, either individually or collectively, would find it difficult to dispose of the whole number. There are various ways of overcoming the difficulty. Let them form committees to bring to view the matters of consideration specially referred to their vigilance.

Thus committees of localities, say the members of each county, might deal with matters having relation to their county; while all the members for counties, all the members for the metropolis, metropolitan cities and large towns, all the members for towns, all the members for rural places, all the members for ports and maritime places, might be formed into committees for the consideration of matters more immediately affecting their places. Committees might be formed, too, of special subjects of general laws, of acts, votes, and proceedings, in their various forms of petitions, accounts, bills, estimates, &c. &c., which would consider the matters under the practical forms which they assume, and as advisers bring to the view of the house whatever of novelty, or exception, or objection, or irregularity might call for its attention.

Such committees being standing, and acting under standing orders, and assisted by competent chairmen and clerks, would soon master the matters, and give fulness, regularity, and certainty to the operations of the House, and infuse into the whole body a practical intelligence and skill, and habit of mutual assistance, which its present mobbish character forbids. There are some things that may be served by unity, as matters of execution, and others by multitudinousness, as matters of council, and others again, like the present subject, require a combination of both methods.

The members of the House, being charged with this committee-work under different phases, could not have either the time or inclination to usurp the functions of the executive, while they would acquire so much knowledge as not to be induced to desert their own, and thrust them, in stress of work, upon the executive.

That something must be done is universally felt, but the inclination is as universal, to blame every body but one's self, who will be found to be, in most instances, the person in fault.

The main difficulties which cross our path, as well in this as in many other enterprises, are (1.) want of knowledge of the whole body of measures under consideration, or in course of execution.

2. The supposition that nothing opposed to the present conventional method of proceeding is practicable. Custom has rendered it a second nature, and it has become the very foundation of our operations.

3. The supposition that the work proposed is to be done by ourselves, without aid and without facilities, other than such as now exist, and with all present hindrances.

The first difficulty may be removed by the skill and diligence of an index-maker, acting under the direction of somebody conversant with official and parliamentary affairs.

The second may be removed by shewing that the great difficulty results less from want of organization within the House, than from want of preparation, and that that which results from the internal state of the House, may be overcome by the extension or development of the present system of committees, distributing the work more fairly over the whole body of members, young and old, influential and uninfluential; and by the application of the system adopted in private business, to public business of the same nature.

The very distribution of the work among the committees, would teach the scope of the whole work, and many of the recondite considerations which are to be regarded.

The third supposition is to be conquered by reinforcing the departments of state with proper legislative assistance, and by reinforcing the House in like manner.

But a capital means will be the bringing under view the steps which ought to be taken from the first inception to the final stage of every measure, and immediately after the passing of the measure, and by requiring that every stage shall be faithfully attended to the full extent of its requirement; and to that end, that every stage shall have its appointed agent, responsible for the full performance of the attendant duties of that stage. The following table will give a fair notion of what the stages are, and the matters that belong to each stage; and a practical legislator will find his account in doing some legislative work, in full detail, according to the order and manner of proceeding indicated by the table. Few miscarriages would happen, if they were accurately regarded.

We believe that no unnecessary point is inserted. It would be

desirable, for practical purposes, that many of them should be detailed and exemplified.

Having before us the main propositions of grievance or defect, the first step is Preparation of the Measure by collecting the—

1. Petitions by the Subject.
2. Representations by the Public Authorities.
3. Reports of the Courts of Justice.
4. Complaints and Observations by the Press.
5. Reports by the Legislature.

And by making—

6. Inquiry into the State of the Law.
7. Inquiry into the State of the Grievances or Defects.
8. Inquiry into the State of the Expedients in Use.
9. Inquiry into the Conformableness of Existing Arrangements, with such proposal, and the necessary Modifications of Existing Arrangements.
10. Inquiry into the Conformableness of the Proposals, with Existing Arrangements, and the necessary Modifications of the Proposals.
11. Resolutions of Matters of Principle.
12. Instructions as to Matters of Detail.

The second step is the Reduction of the Measure into form :—

13. In Relation to the Whole Body of Law.
14. In Relation to the Common Law.
15. In Relation to the General Law.
16. In Relation to the Special Law, of which it forms a part.
17. In Relation to the Individual Law to which it is proper.
18. Preamble Statement of Law.
19. Preamble Statement of Grievances.
20. Preamble Statement of Expedients.
21. Preamble Statement of Expedients available.
22. Preamble Statement of Resolutions and Instructions.
23. As to Special Matters.
24. As to Special General Matters.
25. As to Transitory Matters.
26. As to Explanatory Matters.
27. As to Supplemental Matters.
28. Collection of Rival Projects.
29. Subjection of all to the same Process.

The third step is the Consolidation of the proposed Law and its matters with the existing Law and existing matters, of which the Processes are :—

30. Ascertaining the Particulars of the Institutions and Law of England.
31. Ascertaining the Particulars of the Institutions and Law of Ireland.
32. Ascertaining the Particulars of the Institutions and Law of Scotland.

33. Ascertaining the Particulars of the Institutions of the Laws of the Colonies.

34. Ascertaining the Particulars of the Institutions and Laws of the Empire (not proper to any of the above).

35. Assimilating the different Matters to a Common Standard.

36. Developing them where deficient.

37. Expurgating them where excessive.

38. Amalgamation of the Matters without Repetition, Excess, or Deficiency one Body of Law.

The next step is the Revision of the Whole :—

39. Revision of the Structure.

40. Revision of the Matter.

41. Revision of the Ordering of the Matter.

42. Revision of the Verbal Expression.

43. Revision of the Typographical Expression

44. Report of Exceptional Peculiarity.

45. Report of the Defects of Unity.

46. Report of the Defects of Uniformity.

47. Report of the Defects of Propriety.

48. Report of the Defects of Comprehensiveness.

49. Report of the Defects of Completeness.

The next step is the Programme or Report as to agenda of matters of attention at each stage of passage through the Legislature :—

50. On Notice of Motion.

51. On Motion for Leave.

52. On Parliamentary preparation of the Bill.

53. On Printing of the Bill.

54. On First Reading.

55. On Second Reading.

56. On Going into Committee.

57. In Committee as to Administrative Matters.

58. In Committee as to Official Matters.

59. In Committee as to Inquisitorial Matters.

60. In Committee as to Matters of Record.

61. In Committee as to Judicial Matters.

62. In Committee as to Matters of Sub-Legislation.

63. In Committee as to Financial Matters.

64. In Committee as to Special Matters.

65. In Committee as to Local Jurisdiction.

66. In Committee as to Direction, Inspection, Superintendence, and Control of Matters.

67. In Committee as to Persons affected.

68. In Committee as to Proprietors affected.

69. In Committee as to Commercial Persons affected.
70. In Committee as to Professional Persons and Functionaries affected.
71. In Committee as to Suitors affected.
72. In Committee as to Rights and Obligations generally.
73. In Committee as to Tribunals.
74. In Committee as to Procedure.
75. In Committee as to Pleading.
76. In Committee as to Forms.
77. As to Consideration of Report.
78. As to Recommitment.
79. As to Third Reading.
80. As to Title.
81. As to Passing.
82. As to Carriage of Bill to other House.
83. Proceedings of other House.
84. Disagreement of the two Houses.
85. Proceedings on Passing the Legislature.

The last stage, but to be had in mind in all the earlier stages—
the Action on the Law immediate on its passing :—

86. Notice in Gazette or other Promulgation.
87. Notice to Special Authorities.
88. Notice to Special Persons or Officers affected.
89. Incorporation in General Law.
90. Incorporation in Special Registers.
91. In Histories of Matters.
92. In States of Matters.
93. In Teerries of Places affected.
94. In Rolls of Persons affected.
95. In Charges of Persons affected.
96. In Calendars of Persons affected.
97. In Registers of Transactions.
98. In Instructions.
99. In Index Concordances.
100. In Commentaries.

This table is purposely drawn out, not fully, but sufficiently so as truly to explain the practical legislative processes, both antecedent to, incident to, and consequent on, the action of the legislature in each case ; the neglect of which has begotten so much miscarriage, so much misunderstanding and conflict among our legislators, and between the legislature and the judiciary. Impatient souls may vociferously ignore the necessity of such elaboration, and some of the ministers and servants of the legislature may echo the vocife-

ration, but they who have been engaged in the processes, as assistant legislators and as officers appointed to execute the defective legislation, will think no care and pains excessive; and by taking the matters point by point in the order of sequence, by assigning to each matter appropriate skill—by assigning cognate matters to the same committee or tribunal, and by aiding the committees, not by one or two highly paid officers without assistance, but by a well-instructed and well-trained body of officers, duly organized to do the work, after design, plan, and specification, and upon estimates and contracts, this work, just as well as has happened with many other great works, may be executed with accuracy, and with due despatch and punctuality.

The above is a mere outline of the course of operations as they occur in each single instance. It must be reserved for another opportunity to show the great scheme or outline of the end to be obtained, as well as moulds or models for the use of the workmen, by which the utmost attainable simplicity and intelligibility may be obtained, so that legislator, judge, officer, lawyer, and common person may each see that law which it concerns him to know, in the shape in which he specially needs it, and, at the same time, in a shape coherent with the main body of law, and calculated to give it not one but all the aspects in which law has to be regarded, without confusion or repetition, and without bringing to view more than the special user of the law requires for his purpose.

The late Statute Law Commission refused to give opportunity to present these matters to its attention. The committee of last year of the House of Commons was cut short by the sudden dissolution of Parliament. The members of the late Government did not resume that committee, and thus this, and other plans, all deserving of consideration, have been shut out of view.

It is a maxim of ours, founded on some experience of its practical utility, that it is wise to accept every plan to the extent of recognising its nature and specific uses, since whether it be adopted or accepted, it aids to enable ourselves and others to appreciate the value of our own.

The liberal members of Parliament, and the liberal members of the Government, will do well to consider, whether their predicament does not arise from an exclusiveness of policy, which

deprives all things of comprehensiveness and completeness, and so ensures their failure.

Supposing that the suggestions herein given not to be extended, it may be well to suggest a convenient agency, not a complete one, or that most to be desired or most practical, but a convenient one, by which practical assistance may be given for the execution of the subsidiary details to which we have adverted, and which are necessary for complete parliamentary success, and the reduction of legislative business to a practicable quantity.

Assign to each of the above stages a good practical workman, capable of performing the services incident to it, and bound day by day to render such services in respect of whatever measure is submitted to him.

If the work be too much for him, supplement him by an assistant, who may work, ride and tie with him, thus perfecting the routine by rendering it more continuous.

If the work be too much for them, proceed in like manner, until each day be covered with its appointed service, and the whole work be made entirely continuous.

Then, if the force be insufficient, double it, by giving to each an assistant of the lowest grade of service, a mere register-keeper.

If still insufficient, add a writer and reader.

If still insufficient, add an agent or manager.

If still insufficient, add a recording officer.

If still insufficient, add an executive officer.

If still insufficient, add a principal assistant.

Observe this order as that which is the most suitable, as it is the natural and usual order of supplementation of assistance pursued in most businesses.

But, before you supplement so entirely the official aid, complete the literary and mechanical assistance.

By the use of the mechanical assistance forms containing all constant matter may be supplied, leaving to the literary assistance to furnish the *variable* matter adapted to the occasion.

It will be the function of the stationer, with the aid of the other mechanical assistants, to furnish these forms, and to collect together therewith all exemplifications of the application of the forms, to the end that stereotyped forms may not come to be

used, without distinct reference to the special purposes of each occasion.

If instructions accompany these forms, the peculiarity of each, and the occasion for the peculiarity, may be indicated, till the form become an exact application of the scientific purposes of the transactions, with the nicest adaptation of it to every the minutest particular, such as may satisfy the most classical and tasteful mind.

But, that the inferior agents may not be impeded by the inadequacy or incompetency of the higher agencies, the following operations must take place simultaneously with those above-mentioned, or soon after ; and care must be taken that the supplementation of the higher agencies, by such means, may be made by the employment of persons fully conversant with, and appreciating the details of procedure provided for by the inferior agencies. It is by the want of harmony, not to say mutual understanding of the higher, the middle, and the inferior orders of official persons, that so much failure arises.

An officer of the army must pass through grades of service that make him accurately acquainted with all that concerns the common soldier, and each grade of service beneath him. Not so with the official : he passes to the very top of the service by perhaps the gift of words, ignorant of things in their stubborn nature, and still more ignorant of persons in their stubborn nature, and conceits himself that, because he is chief in position he is chief in knowledge and acquirement, and acts accordingly, with arbitrary confidence, ignoring the traditions of his office and the practical experience of his assistants.

The official system should be made more natural and uniform, more conformable to, and efficient for, its purpose ; and then it should be applied uniformly to all departments of service, with such special adaptations only as its special exigencies may need.

If this rule were applied to the House of Commons, the members would become masters of official routine ; and when, by the chances of political warfare, or by the supremacy of merit, they should come to be placed over other departments of service, they would have nothing to learn but the special matters of their office ; and their viceroy would neither rule over them, nor would

they recklessly destroy the fabric and its valuable uses by reckless change.

The practical knowledge of official mechanism, and the means of ensuring constitutional action and responsibility, would become a matter of common knowledge ; and it would come to pass, that there would be less trouble in creating new institutions and modifying old ones ; and there would be less of that heedless diversity of system which is found to prevail in most of the public institutions of the country, and less difficulty in overcoming the arrears of measures, that now distract attention and impede legislation.

ART. VII.—CONSIDERATIONS ON COSTS.

It has long been a matter of extreme surprise to us, that among the many proposals for the reform of the law, which have been cropping up of late years so plentifully, we so seldom hear of any proposal for mitigating the plain injustice which is every day done by the course of our law in regard to costs. We believe that the perpetual recurrence of the injustice has so accustomed us to it, that we do not in general think it an injustice at all, and yet, when stated in words, it amounts to a truism to say, that the refusal of a right is an injustice, or even the refusal of a right, except on conditions. What is the meaning of a right ? Is it not that to which a man is *unconditionally* entitled ? And to annex conditions to that enjoyment, whereto a man is unconditionally entitled, is an injustice as *plain*, though perhaps not as *great*, as to refuse him the enjoyment altogether : yet is this done day after day, and day after day passes without comment.

Take for example a very common case, which will illustrate the position we have chosen. A question arises between a single plaintiff and a single defendant, a question whereon the rights really appear doubtful, and there is no moral blame attaching to either side, they have simply taken each the view of the matter which makes most for his interest ; suppose the suit comes on

either at law or in equity, and the decree is for the defendant, and let us, to take the most favourable case, even say that the decree is in his favour with costs : the plaintiff appeals, and on the appeal the court is divided,—the decree below is affirmed, but *without costs of the appeal*. This is the universal course of practice under such circumstances, at least in equity.

It is a hard case on both sides ; there seems no reason in truth and justice, why the plaintiff (who by the mere uncertainty of the public law and without any blame attaching to himself, has been put to the choice of abandoning what he thinks, and with fair grounds, to be his right, or else of asserting it by an appeal to the justice of the country,) should have, in the latter alternative, to pay heavily for settling the law, to his own detriment, and solely for the advantage of the public, to pay for clearing up doubts in the promulgation of the laws which the public is bound to have promulgated free from doubt. Strict justice would say that the public, which left the doubt, should pay for its solution, more especially as that public forbids the individual from ignoring the doubtful law, and relying on his natural remedy of force. But concede for the moment the point in the plaintiff's case, and admit that he must pay, not for any moral fault of his, but for his very slight error of judgment in misinterpreting the hopeless enigma set him by the legislative sphynx ; how are we to defend the case of the defendant ? Is it not too much that Œdipus too must be devoured, because the stupid Thebans have not answered the riddle, although he has shown himself of such sagacity as to baffle the sphynx intellectually ; still eaten must he be ; while she, instead of dashing herself from the rocks, proceeds to invent other cruces, for the confusion of the other Thebans.

We know of one case which occurred lately, where, on an appeal to the House of Lords, all the Lords were unanimous in favour of the respondent, who had been defendant in the cause below, yet the appeal was dismissed *without costs*, because there was one case on the books which seemed to favour the appellant's view. The costs of one respondent on that appeal were about £1200 ; and this he had to pay, because, he being in the right, another person chose to take a different view of the law.

Now, if we were not so used to this injustice, could we fail to be struck with it ?

Another very common case is where a bill is filed to enforce specific performance of a contract for the purchase of land, and objections are taken by the purchaser to the title. On the hearing, the objections are shown to be bad, and the contract is decreed to be carried out, but *without* costs on either side.

Now this may be fair in a case where the objections are taken on matters of evidence which the vendor had neglected to provide, for it may be said that he ought to make his title quite perfect, or as perfect as it is possible to be made ; though, in that case, why is the purchaser to pay because he did not choose to take the title unless made as clear as possible ? But in nine cases out of ten it is not on a question of procurable evidence that such a state of things arises, but on a question of disputed law ; and here again the fault lies with the public, and the public should pay. There is no use in multiplying examples, as they would hardly be intelligible to persons unacquainted with law, and to those who know what law is they are unnecessary, as each one can remember cases unnumbered of injustice effected by right decrees on costs, that is, right as the law stands.

Now on what basis does all law stand ? If society requires a strong man to give up his power, nay his right, of defending his rights, by his right hand, is not society bound to secure him in those rights ? If it require a man to forbear defending himself where his adversary is weaker, is it not bound to defend him where his adversary is stronger ? Yet here we have the law stultifying itself by proclaiming authoritatively, these are your rights, but you must pay if you will have them, and if you have not money to pay, then you cannot have your rights. Surely this is saying, "if you have not money, we will do you wrong," for a denial of right is an infliction of wrong.

The matter were not so palpable if it were not that the two decrees go together, the declaration of right and the denial, or rather refusal, of it, at the same time.

One other case we may call our reader's attention to ; that of bankruptcy, or insolvency. The principle of bankruptcy is that each creditor gives up something of his rights, for the benefit of

the creditors collectively, and is compellable to do so by law. Now this is all very right, but if you take away from a diligent creditor his advantages, you ought at least not compel him to pay your expenses, or any share of your expenses, in depriving him of those advantages : in fact, to make the expenses of bankruptcy a charge on the bankrupt's estate, is because the creditors have lost some of their rights, by misfortune, to make them pay you for depriving them of other rights.

In the case of a surplus estate only, should any costs of a bankruptcy come on the bankrupt's estate, such surplus should of course be applied, as far as it will go, to indemnify the public for the costs, which the public ought to bear in the first instance.

But enough of examples: if the injustice is not plain to the moral eye of the reader, any further exposition were displaying one colour after another, to one who is conscious of none ; if a man cannot see an object which is red, it is hopeless to attempt to make him do so, by showing him a similar object which may be blue or yellow.

The apparent argument which is urged in favour of the present system, is that which was long since overturned by Bentham, viz., that those who gain the advantage of the laws, should be the ones to pay for that advantage ; those whose rights being doubtful have been cleared, should pay for the clearing. To this it was well and truly answered by Bentham : those who gain the advantage of the laws, are those whose rights have been secured *without question*. Those who are put to the trouble, annoyance, and delay, which are inseparable from legal proceedings, so far from paying further, should rather be indemnified by the public, which has, by mal-legislation, brought these evils upon them. The doubt upon their rights was one injustice inflicted on them by society, and cannot be cured by the additional injustice of making them pay to remove those doubts, which, but for society, they might ignore, and rest securely relying on their strength. There is no other argument of which we are aware, resting on principle, in favour of the existing state of things ; but there is one of some weight based upon the probable evils of a change.

It is said litigation would be stimulated. We answer, if it were so, the evil is questionable ; it is a less evil that true rights should be honestly pressed, than that injustice should triumph

unopposed, because of the poverty or timorousness of the injured ; and it is only to just prosecution of true rights, that our proposed changes could act as a stimulus. If there were any appearance of a frivolous claim urged, or a frivolous defence relied on, by all means let the party urging such claim, or relying on such defence, alone pay the costs of both sides, and let each side pay its own costs of malpractice, or bad pleading, or anything which may be charged to its neglect or misconduct. But where the dispute arises from a question of law, which is open to reasonable doubt, all the costs necessary to raising and deciding such question, which have been honestly incurred, ought to be certified by the court and paid by the public. The discretion might safely be left to our judges; the questions of costs are, as it is, in their discretion in courts of equity, and less injustice would be done by a wrong decree, under the altered system, than at present; since, if a judge is incompetent, it is fairer that the public should pay for his incompetence than a private person,—the public has appointed him, he is the officer of the public.

There is one practical difficulty in the way: we do not deny it. The change proposed would increase the civil list. Here we believe is the true difficulty in the way of the change, all others, both speculative and practical, fade into insignificance before it; this, however, is a question for the statesman, not for the philosopher, and is better considered apart; it is well first to consider if the change be right; secondly, if it can be made. People will no doubt object to be taxed, but if the change is clearly seen to be right, there is much reason to hope it will eventually be made: West India slaves were once emancipated, which shows that a country will sometimes pay for what it is convinced it ought to do; besides, many will really gain by the change, and no one can tell how soon he may himself suffer by the present state of things. In any case it is something to be brought to the confession, that it is a choice between dishonesty and poverty; and this country is backward to admit, that she is too poor to be honest. If she be, who is rich enough to be honest.

The change, as we have before stated, we think, is really open to no objection in point of principle, and the difficulties in point of detail, if any, might easily be got over; waiving, therefore, the

financial difficulty, let us consider some further probable consequences of such a change.

First, It is an admitted desideratum, that the poorer classes should have cheap law, or at least it seems to be so admitted. But what the poorer classes want, is not cheap and bad law, but cheap justice ; and nothing that can be given them in the way of small courts and inferior judges, would at all come up to the advantage they would derive by having their cases decided by the ablest men, and in the best courts, being at the same time indemnified against all expenses incurred *bonâ fide*.

The county courts would not, at the same time, be superseded, there are many advantages which they possess, and not the least would be the speed of their decisions, which must of necessity be greater than could be attained in the superior courts. The advantages, even of the county courts, would be extended, since the law could be put in force, even in them, at a less expense to an honest claimant, or at least, at a less risk than can be done at present.

This would be one and an immediate advantage derived from the proposed change. There is one which is more remote, but not, in our belief, of less importance.

It is a matter of every day observation, that the legislation of this great country is carried out more imperfectly, crudely, and unskilfully, than that of any other country in Europe ; that, though the policy of a measure may be good, its form is such as to render it unintelligible in many cases, difficult of construction in almost all ; and the reason is to be found in the way that legislation is conducted. The forms of debate are not well adapted for maturing the *form* of a law, though admirable for obtaining the sense of a body, on the abstract merits of a principle which can be reduced to a single issue ; and our legislature has never taken means for providing any machinery by which the propositions affirmed by our Houses shall be reduced into well-framed and well-considered laws—and why ? Simply because it is no body's business, and nobody in particular has to pay for the default ; it is a matter of complete chance at whose expense any doubts in the law shall be cleared up ; and the errors of legislators are paid by the unfortunate, who shall first have a case raised under the pro-

visions of a statute, a statute perhaps passed with the intention of relieving persons in the very condition he may happen to occupy. If the proposed change were adopted, it would become the immediate interest of every constituency to urge on their representatives that proper measures should be taken for reforming our legislative machinery. It would be the immediate interest of every ministry to take measures to have its bills as well framed as possible, for a government could effect by good laws a great saving in the expenses, and consequent taxation of the country. One class would at first seem to be injured, viz., the lawyers, even they, however, would not be injured so much as dispensed with; there would not be so many of them needed, and the work which they had to do would be lightened. If our proposition in any degree tended to so desirable a consummation as the framing of well-contrived laws, it would in itself save the country in general a vast expense, now annually incurred in litigating the meaning of acts of parliament; and it would, at the same time, effect an equitable, or more equitable, distribution of the necessary costs of unavoidable litigation. Both these ends, if attained, would be great blessings to the country, and if our efforts shall at all conduce to either of them, we shall feel rejoiced that we have used those efforts to such effect.

Charns.

ART. VIII.—LOCAL JUDICATURE.

AMONG the great changes and manifest improvements in our jurisprudence which have of late years been effected, there is none more important than the establishing of Local Judicature. But much remains to be done before we can have any right to affirm that its great object is attained—the bringing home justice to every one's door. There are manifest defects still to be supplied, of which there only need be mentioned three capital ones. There is no equitable jurisdiction intrusted to the County Courts; they are confined in the authority which they possess to

causes of less importance than they could well deal with ; and their unlimited jurisdiction by consent has been so vested that the option is rarely exercised. Nevertheless, although thus crippled and thus restrained, they have been of inestimable benefit to the community, and continue to bestow upon it, for the first time in the history of our judicial system, the blessings of a law accessible to all classes, without the vexation of endless delay, or the burthen of unbearable expense.¹

The opposition which this system has experienced, both from the legal profession and the bench, is very remarkable. That it should be no favourite with the bar, and if possible less agreeable to the attorneys, might naturally enough have been expected ; but the judges, whose labours it tended so materially to lessen, might naturally have been expected to regard it with favour. Yet while disclaiming all intention of undervaluing Local Judicature, and using respectful language towards those who preside in the County Courts, no one can avoid perceiving that these courts are regarded as an encroachment upon Westminster Hall ; and very recently, the most manifest indications of dislike, if not of hostility, have been displayed. The utterly erroneous, and, indeed, unconstitutional doctrines, which have been ventilated in high quarters, in connection with this subject, demand the most serious attention, for they are most perilous in their tendency. As they almost altogether spring out of the controversy respecting the salaries of the County Court Judges, we may at once advert to that as the issue between the friends and the adversaries of Local Judicature.

The original design was to secure the services of the ablest and most respectable member of the profession, by allowing £1500 a year. This was the sum proposed both by Lord Brougham in 1830, and by Lord St. Leonards asserted to be absolutely requisite (House of Commons' debates, *Hansard* xxiv., 267, 284, 29th April, 1830) ; unhappily it was reduced to £1000, when the bill passed in 1846. Some years after, the House of Commons voted the sum of £1500, and not less than £1200. This led to the crying evil of the Treasury apportioning the salaries ; and

Lord Brougham's original Bill of 1830, extended to £100, gave testamentary jurisdiction, and local, that is circuit, appeal.

according to some notions of the amount of business transacted, assigning to one £1200, to another £1350, to a third £1500. It was found that the grossest blunders were committed in this apportionment, even upon the absurd principle adopted of taking as the rule the amount of business done. Thus all the metropolitan courts were allowed £1500 ; while it appeared that five of them tried, on an average, only sixty-four causes, from £20 to £50 ; and five of the provincial courts tried 130, or more than double. So if the number of days was taken as the test, it was found that of the fifteen selected for the highest salary, the average sittings were less than of those excluded. Indeed, comparing individual cases, five courts, with the increased salary, were found to sit little more than half the number of days which five others sat, who were confined to the lower salary. The number of hours sitting afforded no test that could be relied on ; and the material circumstance of distance was entirely left out of view by the Treasury ; though it was notorious that the metropolitan judges had only half an hour or an hour's drive to the court, while some of the provincial judges travelled hundreds and all of them scores of miles—one no less than five thousand in the course of the year. Never, in short, was any arrangement more full of gross blunders and crying injustice. But the most grievous part of the whole was the monstrous plan of leaving a Treasury official to apportion judicial salaries at his pleasure. Indeed any such apportionment, any discretion in a matter so delicate and important, was, when the subject came to be examined, held to be utterly inconsistent with the nature of the case, to what hands soever that discretion might be intrusted ; and accordingly all the Law Lords declared their opinion to this effect—Lord Cranworth (Chancellor), Lord Lyndhurst, Lord Brougham, and Lord Campbell, alike treating it as (in the words of Lord Campbell) “ monstrous, and not to be endured for a single moment.”

It became, therefore, altogether impossible to continue this practice any longer ; and it was resolved to equalize the whole salaries. Nothing could be more unhappy, or in itself more unjust, than the mode hit upon by the late Government to effect this equality. The House of Commons had determined that £150 should be the *maximum*, and £1200 the *minimum* ; but

allowing that all might have either the former or the latter. The Government said, "Let all have the *minimum*;" and though those to whom £1500 has been assigned, fifteen in number are to retain that salary during their time, their successors are to be reduced to £1200, when, very certainly, their duties will be as laborious, very probably more laborious. Indeed it is one of the many absurdities committed in this matter, that all the while the salaries are reduced, the business cast upon the courts is increased. Hardly a session passes in which some new work is not given to these courts. Thus one act gives them jurisdiction in important and often difficult cases of charitable trusts; another in questions of revenue; a third in arrest of fugitive debtors; while a fourth enables judges at *Nisi Prius* to send cases to them for arbitration. The entire success of the system is of itself a great and constant cause of increasing their business from an average of four to 50,000 causes during the first ten years; the increase has been such, that above 700,000 was the amount last year. It will not be credited, some years hence, when the petty and personal cavils of the present day are forgotten, that disputes could ever have arisen, and among legislators of high judicial station, upon the assigning a few hundred pounds, more or less, to secure the services of the best men in courts of such vast importance, performing the bulk of the judicial business of the country.¹

But the question of salary is really not the matter of importance in the present discussion, although we take it as the issue on which the adversaries of local judicature have deemed it expedient to take their stand. The substantial cause of dispute is

¹ Above five millions of causes have been disposed of since the establishment of these courts; settling claims to the amount of sixteen millions sterling. The increasing all the salaries to £1,500 would only require the exercise of the power given in the act (19, 20 Vic., c. 108), and making the fee on each plaint one shilling in the pound, which would raise double the sum required. But such places as that of high bailiff, who, in some courts, has £1,000 a-year, though not a professional man, should be abolished; and whatever can be done by stamps should be so done. Two leading members of the present government strenuously urged the increase of salary. Sir J. Pakington moved and Lord Stanley seconded this.

the aversion entertained towards the county courts. The errors, both in the principle of apportionment and in its application, were exposed and exploded a year or two ago; but have left their influence somewhat less openly avowed upon those who now deal with the subject. That influence is plainly to be traced in the latest discussions; and it is closely connected with that undervaluing of the local courts, which has unfortunately been too prevalent an error of those in the higher judicatures. The unhappy misnomer of *small debt courts* has had no little hand in propagating the prejudice on this subject. That small debts are to an enormous amount disposed of in these courts is undeniable, and is a most happy result of their establishment, it being certain, on the one hand, that we have no right whatever to reckon any debt insignificant, and on the other that the former small debt courts were found in every respect unsatisfactory. But the name might just as well be given to the superior courts. When the average number of writs issued in the superior courts was, by the return in 1855, 81,000, nearly one half, 40,000, were for sums under fifty pounds; so that half the business of these superior courts was of the same description with the business of the county courts. No doubt a much larger portion of the county court business was confined to debts, which, although they may come before the superior courts, yet in general do not. Yet, let us only make the comparison on the debts above twenty pound, in which there is, practically as well as by law, a concurrence between the local and the central courts. Of the 100,000 actions brought in the superior courts, two per cent, according to the statement of the commissioners, proceed to trial—that is, about 1,000 of the 50,000, but for sums under fifty pounds, and by far the greater part above twenty pounds. About 8,000 last year were brought for such sums in the county courts; but above one-half of these were actually tried; and in order to estimate the great aid derived from these courts by the superior courts, we have only to note the falling off which their establishment occasioned in the business of the latter. It fell off one-third; the difference being between 120,000 and 80,000 actions brought; and of those tried, the difference was between 2400 and 1600—or a falling off in the pro-

portion of three to two. We do not mean to dispute that the late changes in the law of procedure have tended to increase the business of the superior courts, at least, their business in chambers and in *banc*, while the falling off in all the circuits, and at *Nisi Prius* in London and Middlesex is undoubtedly very great. But the increase of the county court business, to which we have already adverted, has been much greater in proportion than in the superior courts.

Among other errors that have been intruded into these discussions, and by persons of high judicial station, two are to be noted as of a most pernicious tendency, being contrary to every principle which ought to guide us in dealing with the question of judicial service as regards its remuneration. The first error is that of Lord Cranworth, whose argument in favour of the lower salary was that as often as a county court judgeship fell vacant, he had many applications for it from respectable barristers. To this the answer was obvious, and was given, that on any judicial vacancy, including that of the Great Seal, there never would be wanting men of perfect respectability, and even quite competent, ready to take the vacant office, at half the salary now assigned. T. Paine declared that an able-bodied man could be found willing to take the office of king for five hundred a-year, and that we give fifty thousand. That a very sensible difference existing between £1200 and £1500 a-year, men who would refuse it on the one footing will take it on the other is undeniable; and as success at the bar is the main test of eminence, no doubt can possibly be entertained that the better salary gives a choice among higher members of the profession.

The other error is that chiefly of Lord Wensleydale, whose feelings on county courts savour strongly of the courts in which he has so lately been a distinguished judge, we may add, one of their most able and useful members. He has, according to the late statement of Lord Chelmsford, been occupying himself with the statistics of the case, and proceeding upon averages. We pass over the error into which he was led, apparently by the mistake of the clerk in copying a return, and making one judge attend only 45 times in a year. But, in passing, we may well observe how ready his lordship's belief touching county court judges must have

been, when he never suspected that this *must* be a clerical error, or at least an instance arising from mere accident; for who could fancy that any judge had sat much less than one day in a week, unless he had been ill! The number was manifestly 145, and not 45. But we go to his lordship's doctrine of averages. Now, we utterly deny that this affords anything like a safe, or even a rational criterion. How would it fare with the Court of Queen's Bench if at all times an average was taken of the business in the three courts? and how would it fare with the judges of all the courts if the amount of their business was always to be taken as the rule for apportioning their salaries? For a long course of years there was so little business done in the Court of Exchequer, that the standing joke in Westminster Hall was to compare the barons to partridges in November, as no sooner sitting down than they were up. Yet of late years that court has been overloaded with business. The Common Pleas too, for some years, had so little to do that it used to rise before midday; and the chief-justice had been heard to say, "Don't go further in this, for to-morrow we shall have nothing at all to do." There is now no lack of business in that court. All this leads to the conclusion that ample salaries must be given in order to secure able and worthy men, and give the community the inestimable benefit of their services at all times; men able always to perform their high duties satisfactorily, whatever may be the fluctuations in the amount of labour which these duties shall exact.¹

The system of local judicature has become now so deeply rooted in this country, and in the affections of the people, that no pre-

¹ The rearrangement of the districts of these local courts has become necessary and been effected, but not before great evils had arisen from the pressure on some of the judges. Mr. Pollock, at Liverpool, was sacrificed to his zeal in undertaking more than any man's strength could sustain. It is nothing like an answer to the complaint often made by him, that his overwork was owing to his great popularity among the suitors. A colleague ought to have been given him; and if the existing act did not authorize this, it should have been amended, and its powers enlarged. Some complaint of non-residence has been made in one or two cases. But a more strict superintendence by the Great Seal should have remedied this; and it is affirmed that in the case chiefly referred to, the bad health of the judge was the chief, if not the sole, cause of his absence.

judices, in any quarter, should they succeed in disinclining the government or the legislature towards them, can ever cause a retracing of the steps by which their establishment has been brought about. Nothing remains, therefore, but to improve them, and to take every possible precaution against either unworthy or inefficient appointments, as well as to extend their great usefulness, and amend their procedure.

ART. IX.—LAWYERS' LITERATURE.

NOVELS. MARGARET HAMILTON.¹

THE "Novels" of the present day comprehend all interests, all transactions, human and divine, and many of them depict with wonderful force and accuracy the pictures of life, that are, or ought to be, under the cognizance of our profession. It is clear that no law library is complete without the legal novel, as no lawyer is complete without a knowledge of human nature, and conventional (or second) nature, which stand before all law, and constitute its substantial, its essential part.

We recollect being much amused in the early stage of our career, at the assertion by Chitty, in one of his numerous publications, that the lawyer should know all science. We have found, in later times, much ground for the position, and have witnessed some signal successes in our profession, which have been due to a general and accurate acquirement of scientific knowledge. The legal novel does, in an imperfect way, something of this duty; and if people read novels with any idea that there was in them matter of reflection as well as matter of amusement, they might be found of as much value as sermons, or as biographies, and essentially more truthful than the latter, which, in no instance that we can remember, have told the whole truth, or the truth in a right spirit.

¹ Margaret Hamilton; a novel by Mrs. C. J. Newby, author of "Mabel," "Sunshine and Shadow," in three volumes. London: Richard Bentley, New Burlington Street, 1858.

The extended parable in three volumes may deal with the subject thoroughly, because in a general and impersonal way. We can look on the picture without feeling that every body about us sees its resemblance to ourselves and our own plight, and apply its counsels to our own case without feeling any derogation of dignity, which ever comes from confession to a fellow mortal, and without suffering that abasement of *morale*, which also usually attends it.

A good novel has another use to a lawyer: it is his fate to see man in unfavourable conditions, and to be apt to deduce therefrom, a pretty lively conviction of the universal existence of original sin in unabated force, cloked indeed with the garb of much conventional propriety, and differently estimated, as it possesses the refinement of the gentleman's education.

The reading of works of fiction, written with sound judgment—and shewing the predicaments, early and late, that produce these consequent manifestations of original sin; the struggle that precedes the fall; the resistances oftentimes successful more than exceeding the failures; how much of failure is due to others as well as ourselves, and how much more to that conventionality which, quelling nature, and the adaptation of society to the crowds for ever coming within its pale and diminishing its gentee resources without preparation for the fate that must befall many of the competitors, must tend to soften the stern judgment with which the legal maxim, knowing no right or left, insists upon applying the severest condemnation, where there is an absence of moral wrongfulness.

Philosophy, like law, is too dogmatic in its principles and too stiff in their application.

It is, then, to men of genial minds like Scott, and to women of the higher order of mind (in respect of force), that we must look for dispassionate pictures of the world as it exists, doubtless informed by philosophy, and constrained by law.

This book (*Margaret Hamilton*), which has given occasion for these remarks, depicts the struggles and the chances of the young lawyer, and is as little melodramatic as a story necessarily got up needs must be.

It touches with painful truth on the relations of the bar to the

attorney, and shews to what accidents success is often attributable. But its chief value is the very elegant and effective picture of actual middle life, shewing the difficulties and the temptations of persons brought up in genteel life, without training for those reverses which come so frequently and unexpectedly, and indeed without training for actual life at all.

It shows how a good character (the heroine), well brought up, may influence, by her own principle and energy, the happiness of her family, but at the same time how great a weight the improprieties and shortcomings of the rest of the family may impose on that one, operating as a fearful drawback on her exertions.

A careful, thoughtful reading of this book and books like this would go far to explain the problems that now perplex most people as to the social condition, to make manifest how much is due to an imperfect education that trains most people for no condition to which they are likely to come, except the social in a most limited form ; neither men nor women being trained for domestic life, for marriage, for the changes or chances of life, for self-dependence, for independence, and yet for that habit of giving and receiving assistance, which all in turn require from one another.

We do not say that this novel depicts all this to the full, but with other works of the like kind, corrected by the actual experiences of every family, by the records of the courts of public justice, and by some biographies, would serve to open up our views of life, and to give to law and to our institutions the soul and body which they so much require.

We will not, by extracts, rob this book of any portion of its interest, but it will do any dry arid lawyer great good if he will read its truthful and elegant narrations, with the patient attention which is due to them.

Our principal object in noticing it was to indicate how much good might be done by those among us who have the gift of literary expression, if they would ransack the dry records of the law, and give the pictures of life of which they furnish the material.

Recent cases have shewn how high folks, noble and genteel, descend to questionable things, but the presentation of such

matters of themselves, is almost an act of obscenity, which good taste and regard for innocence, as well as for the reader's feelings forbid us to detail; besides, taken by themselves, and without the other ingredients of the mingled yarn of life, they create an unjust impression of classes. It is good to shew that no class is free from reproach, but it is necessary also to shew that every class has among its members distinguished by merit as well as the reverse. It is, moreover, good to shew that every age has been marked, more or less, by the same mixed character, now gross, now refined, now in one proportion, now in another; and that therefore we are not to hope that any reforms will bring the millennium, or that any period within the scan of the longest liver amongst us, will lessen the need of care, both by institutions and by administration, to check propensities and tendencies inherent in us.

Modern refinement forbids the direct allusion to many things that must yet be known, in order to protect innocence from the consequences of its natural unguardedness.

Novels that avoid the prurient, and deal with life pretty much as it is, without too much glow of hope, or too much despondency,—which are truthful in their incidents, and do not lavish too good fortune by sudden and not-to-be-hoped-for successes on the favourites of the tale, serve to teach life more effectually than either history or biography do, and certainly with more effect than maxims and precepts, the truth of which is acknowledged, but the application not so easily recognized.

If our grave reporters of law cases would adopt a course intermediate between the loose, hurried, and inaccurate reports of the newspaper, and the very grave and very dry professional reports, and with as much practical living interest as the case admits of, our people would welcome their work, and read them with quite as much interest as they do parliamentary and other reports. And our public writers of all kinds would, bee-like, collect matter for their works, which would spread over the country a knowledge of actualities, and a spirit of caution, that would help them to encounter the seductions of the millionaire sharper, as well as all other sharpers of lesser degree.

We recollect seeing some while ago a collection of reports of *Nisi Prius* trials on matters of popular interest, which had taken

place in this country. It is a pity the literary speculators do not repeat the effort.

The worst of our present case is, that what we read in our newspapers of to-day, is supplanted by the newspapers of to-morrow; our intelligence comes to us like a dissolving view, quickly to be shifted for its successor; the impressions of the one being mingled with those of others, and leaving on our minds no efficient information.

Such a work should be executed by a man of taste and discretion, dealing with delicate matters, with a careful hand, and drawing out to view the inferences that may be of service in the conduct of life, impressing on everybody the impossibility of shirking responsibility by any other means than the due exertion of prudence at the right time, which is usually a long while before we suffer the consequences, often as severe as they are certain.

We have talked much of late of the consolidation of the law, but of far more immediate and practical benefit—and yet a help-mate to the other, which it would much advance—would be a consolidation of our reported cases. A collection of the cases of the same sort, in the form in which they appear in the law books, in *ipsissimis verbis*, with prefaces and annotations, and copious indexes, advising us of the rich material to be found in them.

The vice of originality (the original sin of authors), attempts to produce in new and garbled form, dropping out by the way much rich stuff, things that should be given as they were presented when they were fresh.

We have leading cases illustrating the application of principles; but what we most want, are the ordinary cases exemplifying the action of life in its every-day phase, bringing home to the common people, great and small, the things which it importeth them to know, for their information and guidance in their every-day concerns: books, written for the use of schools or families, or for the use of persons in their ordinary business, avoiding technicalities proper to professional persons charged with the conduct of suits and formal details.

By such means we might revive and spread a knowledge of the common law of the land, and assist, as we have said, in enriching,

with accurate information, the novel, or ordinary reading of all classes of people.

And so it might come to pass that our representatives in the tribunals, the juries, grand and petit, would better understand the judge, and the judge might better understand how to address the jury. And our representatives in Parliament, learning the principles of law, might better understand how to conquer the difficulty under which they labour, of rendering the law intelligible to the people, and a safe direction to the judiciary.

In modern times we work by all ways and means, and find that, by some unexpected route or other, the public become possessed, in a remarkable degree, of a knowledge of the most recondite matters—somewhat evanescent, but refreshed by repeated applications.

It is of the last importance, at the present time, and in the coming changes of all interests and institutions, that the lawyer and the public should be brought more in harmony and in useful co-operation than they have been hitherto.

In the interest which is taken by the public in law reform, there is an evidence of an appreciation of the common interest in the law and legal institutions, and every change which has taken place of late years has quickened that feeling. It is wise, then, to give to the people a fuller and more accurate knowledge of the substance and uses of law, and use every effort to make what is imparted to the public, by law book or novel, full, complete, accurate, and, if we may be permitted to add, vindicatory of the law, from the charges of a formal, unnatural, absurd, and useless system of technicalities.

It would not be without great benefit to the public, to the legislator, to the administrator, and to the profession (who are often charged with sins and propensities that properly belong to the world whom they serve, to the authorities who create, and ought to superintend them, and to the general ignorance of law and legal institutions), if the rich illustrations of actual life to be found in the reported cases were stated, in a popular manner, with some annotations indicating whence litigation springs, how much is due to the natural and inevitable play of human passion, to the neglect of the commonest rules of prudence, to the pedantic

and unnatural adherence to technical rules belonging to a by-gone period, to the carelessness of legislation, to the general ignorance among lawyers, as well of other people, arising from the undigested and unconsolidated state of the law, and to the errors that creep into it, by the carelessness of compilers, and into men's minds by the careless and haphazard reference to carelessly written books.

The reporter stops short at the point where the recorder should begin, bringing to view the recondite matters and shewing their application to the business of life.

Time was when literature was regarded as a disqualification for the lawyer ; but, latterly, a moderate devotion to it has not been found a drawback, except in those cases in which the Bar think proper to act as a sort of chief or managing clerk to a solicitor, in the getting up of his cases ; and, even in these cases, literary skill has sometimes been found to give a readiness of selection and aptitude of expression favourable to this sort of work.

We trust, therefore, that in making these recommendations we shall provoke no dull fellow by our remarks ; and that, at the same time, our readers will take heart of grace, and enjoy, in the coming vacation, as we have done, a repeated reading of the delightful book to which we have referred, as full of graceful feeling and refined thought, as of pleasant amusement, and sound instruction of life in many phases.

ART. X.—MEDICO-LEGAL LITERATURE.

1. *Medical Jurisprudence*. By ALFRED SWAINE TAYLOR, M.D., F.R.S., &c., &c. Sixth Edition. London: CHURCHILL, 1858.
2. *A Manual of Psychological Medicine*. By JOHN CHAS. BUCKNILL, M.D., and DANIEL H. TUKE, M.D. London: CHURCHILL, 1858.
3. *The Law Relating to Lunatics*. By C. PALMER PHILLIPS, Esq., Barrister-at-Law. WILDY, 1858.

THE science of Medical Jurisprudence needs to be more cultivated by those who pursue both the medical and legal professions.

Recent criminal proceedings have shewn more than ever, how much depends upon the evidence offered and received in court, by men professing medical science; and the daily experience of our legal readers, whether practising in the criminal or other courts must shew them, first, the advantage of a perfect knowledge of this branch of the law and the too common deficiency therein.

We were once present during a very remarkable trial, when the main issue raised was this, "Is the prisoner a murderer, or was the deceased a suicide?" The facts were conclusive as to these being the alternatives. One of the medical witnesses, who spoke as one being an authority, was forced to admit, on cross-examination, that a few weeks since he was unaware of the existence of Dr. Taylor's work on Jurisprudence (which however he had, in the interval borrowed, *pro re nata*); nor was there any other English or foreign author on the subject, with whose works he was familiar. We do not suppose that this is the general state of things in the country; but when the administration of justice depends so much upon the skill and knowledge of medical witnesses, we should be well pleased to believe that similar ignorance is less common than we fear is actually the case.

Dr. Taylor's Manual on Medical Jurisprudence, which has now reached the sixth edition, is an admirable text book. No English professor has enjoyed experience equal to that which this

author has had for years, both in and out of courts of justice, and to his evidence is always attached the greatest weight. We have heard it insinuated, somewhat ungenerously, to the disadvantage of Dr. Taylor among other scientific experts, that he is a "professional witness." The reflection which is meant to be thereby conveyed is, that such as he are hired partizans on that side by which they are called. Seeing that it is essential to the administration of justice that the assistance of skilled witnesses should in grave causes be engaged, charges of this nature, unless well founded, are mischievous and absurd. Recent trials—some of which have been reviewed in former numbers¹—have certainly shewn that the services of professional men have been, and may be, secured, *not* for the purposes of justice; but this is one very powerful reason for our appreciating and encouraging those eminent men who, like Dr. Taylor, unite the highest character for probity, to well tested and acknowledged skill, and great scientific attainments.

One source of present dissatisfaction with the scientific witnesses to whom we are alluding, occurs in that large class of cases depending on the proof of insanity; yet it is the uncertain application of the rules of law, whether in criminal or civil trials, rather than the character of the evidence in individual causes, which is the fruitful source of the anomalies complained of. In matters too of judgment and opinion, when authorities are antagonistic, it by no means follows that it is the motive or veracity of the witnesses, on one side or other, which is at fault.

Evidence indeed, with regard to insanity, is often of the most contradictory and inconclusive nature. But the subject itself and the well-known and unfortunate conflict between theory and practice of English courts, sufficiently explain the anomalies, without imputing to learned witnesses corrupt conduct. Upon this point Dr. Taylor has the following observations:—

"The great difference of opinion, which exists between physicians and jurists in reference to this plea of insanity, appears to me to consist in this: Most jurists aver that no degree of insanity should exempt from punishment for crime, unless it has

¹ See the trial of Palmer, *L. M. & R.*, for August 1856, page 332; and that of Madeline Smith, for Nov. 1857, page 67.

reached that point that the individual is utterly unconscious of the difference between right and wrong, at the time of committing the alleged crime. Physicians, on the other hand, affirm that this is not a proper test of the existence of insanity; that those who are labouring under confirmed insanity, and who have been confined in asylums for years, are fully conscious of the difference between right and wrong, and are quite able to appreciate the consequences of their acts. Again, those who have patiently watched the insane for years, agree that the legal test of utter unconsciousness of right and wrong in the performance of acts, would, in reality, apply only to persons who were suffering from delirium—from a furious paroxysm of mania, or from confirmed idiocy; and that if the rule suggested by Mr. Warren, that a person in order to be acquitted on the ground of insanity, should be proved to be as unconscious of his act as a baby, were strictly carried out, there is scarcely an inmate of an asylum, who happened to destroy a keeper or attendant, who might not be convicted and executed for murder. Such a rule amounts to a *reductio ad absurdum*, it would abolish all distinction between the sane and insane, between the responsible and the irresponsible, and it would consign to the same punishment the confirmed lunatic, and the sane criminal. This species of baby-unconsciousness of action exists in idiots as well as in furious maniacs, but not in the majority of lunatics; and it may be safely asserted that, if this criterion be the true one, acquittals on the ground of insanity have involved a series of gross mistakes for the last fifty years. The only irresponsible lunatics, according to Mr. Warren, are precisely those who would not even have reason enough to plead to an indictment. Thus, while the medical profession is condemned for adopting opinions which would lead to the acquittal of criminals, the writer recommends a rule which would certainly lead to the execution of the greater number of confirmed lunatics, charged with acts of homicide.

“The practical failure of such a rule is manifest, when it is found that persons who have destroyed life, with a perfect consciousness of the wrongfulness of their acts, are frequently acquitted. In the case of Dadd, who was acquitted on the ground of insanity, and who was proved to be a confirmed lunatic, it

transpired that the man had actually provided himself with a passport and fled to France after destroying his father! (See Wood on the plea of insanity, p. 41). It may be said that the consciousness of the insane is an insane consciousness, while the law implies the consciousness of a sound mind; but this involves *petitio principii*. There are numerous cases of acquittal, however, in which, until the act of homicide was committed, there was no imputation either against the sanity or the sane consciousness of the accused.

“Having pointed out these inconsistencies, it is only proper to acknowledge that in theory the English law would punish a lunatic just as it would punish a sane man, provided the lunatic ‘had that degree of intellect which enabled him to know and distinguish between right and wrong, if he knew what would be the effects of his crime, and consciously committed it; and if with that consciousness he wilfully committed it.’ In practice, however, it is placed beyond doubt that some who ought, upon these rules, to be held responsible, are acquitted, on the legal fiction that they were unconscious (or only insanelly conscious) of the wrongfulness of their acts. Dr. Wood states that of thirty-three males confined as lunatics in Bethlem, who had actually committed murder, not including those where an unsuccessful attempt was made to perpetrate the same crime, three were reported sane; and he feels quite satisfied that two of these were not insane at the time they committed the murders. And of the fifteen males who had actually committed murder, five were reported sane, and two of them ought, in his judgment, never to have been acquitted on the ground of insanity. These facts, then, are sufficient to show that the rule of law generally adopted in practice does not err on the side of severity. The only complaint that can be made is, that it operates with uncertainty.”—*Med. Jur.*, p. 911.

Dr. Taylor, it will be observed, does not enter into the question with a view of offering suggestions for putting it on a better footing, for this is not within the scope of his work. When, however, we read the following remarks which he offers at the close of the very able chapter from which we have already quoted, we cannot help feeling how desirable it is to make some alteration in the

principles or practice which we find adopted in this country. Dr. Taylor says—

“ The principles of the English law have been closely scrutinised by men who have had long experience in the management of the insane, and who have made themselves well acquainted with their habits ; and it has been abundantly proved, that the test of responsibility assumed by it is of a purely theoretical kind, and cannot be carried into practice. With this admission it appears to me unnecessary to occupy space with metaphysical discussions regarding criminal responsibility ; for however defective the rules, if the practice of the law be in any one case in conformity with that which has been advised by writers on the medical jurisprudence of insanity, although it may be adverse to the theory on which it is professedly based, this is all with which we have to concern ourselves : the principle is admitted. The great defect in the English law is, not that it will not go even to the full extent of exculpating a person who has committed a crime under what is called an ‘uncontrollable impulse,’ or an impulse which his reason was not sufficient to control, but the uncertainty of its application. The cases referred to show that an acquittal on the plea of insanity is, on some occasions, a mere matter of accident.”

Those who have closely watched the administration of justice in England, must, we fear, acquiesce in the truth of the above observations, but there is no probability of their not remaining true for any definite period of future time. If the poor woman who dared not bend her thumb lest the world should come to an end—or the man who imagined the earth was covered with a shell of glass under which were snakes, and who therefore was afraid of walking lest he should fall a prey to them, should commit homicide on an object of hatred, and be proved clearly to know (as might be the case very probably) the difference between right and wrong, no jury in England would convict him (as the theory of law presumes they ought) of murder. Again, if the patient who had a firm conviction that his legs were made of glass, (which he feared to break by walking,) had succeeded in assaulting his surly servant who flung a log of wood on one of them, and who thus excited his master’s wrath (while it cured his delusion,) the

ill-tempered fellow would have had small chance of damages in an action for battery against his lunatic master.

The *Manual of Psychological Medicine*, by Dr. Bucknill and Dr. Tuke, does not afford much direct assistance to the consideration of insanity in its legal aspect, though, as a contribution to the subject, in a psychological point of view, and with regard to questions whether or no a person is such a lunatic as should be consigned to professional guardianship, it is a useful volume. Into the subject of the general and medical treatment of the insane, the learned authors have also entered fully; and it seems to us, we may remark, that this is the most valuable part of the work. However lamentable it may be to admit the fact, still the evidence of all times, even down to our own days, leaves no possibility of doubt, but that there is a strong natural tendency among mankind to dislike, neglect, and ill-treat the insane.

To remove into seclusion those who shock, or are dangerous to, the connections whence they spring, is a natural and desirable course to pursue; but it is clear that oftentimes it has happened, now happens, and will in spite of vigilance happen, that the benefits of the connections only of the lunatic have been consulted when he was thus removed; how he fared after having been thus consigned to strange hands, seems to be often a matter of no consideration. Selfishness, indifference, antipathy, personal timidity, and, most of all, ignorance, combined, in days gone by, to produce a lot for the insane which the mind cannot contemplate without horror.

At the close of the last century, a lunatic asylum was one of the most horrible and awful of spectacles. The worst of prisons hardly contained so much of what was cruel, hideous, and revolting, nor so much of what outraged all humanity, and exhibited so much professional folly and ignorance.

Instruments of torture, chains and manacles, cells dark loathsome barred and grated, the scourge and the gag were all at the disposal and under the control of the brutal gaoler—from all which horrors the wretched being, when once consigned thereto, could only expect release by death. Happy he who was murdered quickly, and was thus saved the most fearful lot of sustaining, in unspeakable terrors, an existence in which no sympathy, hope, or

alleviation was possible. A more humane practice, and a more intelligent view of the maladies affecting the mind, have gradually grown up. The evidence before the Committee of the House of Commons, appointed in the year 1815, revealed a history of the condition of the institutions referred to, which was appalling in its detail. And from that time to this the system has been ameliorated, till it is to be hoped genuine philanthropy and improved science have now established principles of treatment which one can view with satisfaction.

It has required, however, constant efforts of the legislature to control those on whom devolves the management of the insane.

It would seem that the earliest provision made in England for the custody of lunatics occurred in the Vagrant Act of 1744. Two justices were by it authorized to secure any furious or dangerous lunatic, and order such to be locked up, and, if necessary, chained. Whatever property he possessed was employed in his maintenance, and his place of settlement determined.

After this Act had passed, viz., in 1763, a committee of the House of Commons investigated the condition of houses in which the insane were confined, and discovered, as might have been expected, their fearfully neglected condition. It was not till ten years later, however, that a bill was prepared by the Lower House to meet the evil; and even this was rejected by the Upper House. In the following year, the bill was re-introduced, and then triumphed, (14 Geo. III. c. 49.) With the exception of public hospitals, houses for the reception of lunatics were now required to be licensed, when situate in London, or within an area of seven miles round the city, by the College of Physicians. In the provinces, and in Wales, this duty was to be performed by the justices at the quarter sessions. Notice of the admission of each patient was to be sent to the College of Physicians, whose licensers were required to visit the houses which they had licensed; while those licensed by the justices were visited by persons appointed by them. This act, which was a step in the right direction, was renewed in 1779, (19 Geo. III. c. 15,) and rendered perpetual in 1786, (26 Geo. III. c. 91.)

Private asylums for the insane received some attention from Parliament in 1812, in the memorable year 1815, and in 1816;

but nothing was accomplished until Lord Ashley and Mr. Robert Gordon carried the bill of 1828, by which the Secretary of State was allowed to appoint fifteen commissioners annually, for the license and visitation of those houses which had been previously licensed by the College of Physicians. They, and the visitors appointed by justices, were to make a certain number of visits in the year to these houses. On no pretext were patients to be admitted into them without medical certificates, and all admissions, removals, and deaths, were to be reported to the commissioners. These asylums were to be visited by a medical man, or to have a resident medical officer.

This act was amended in 1829 (9 Geo. IV. c. 18) ; both were revised in 1833 (2 and 3 Wm. IV. c. 107), when the Lord Chancellor was directed to appoint commissioners with a much wider jurisdiction, called the "Metropolitan Commissioners in Lunacy ;" and power was given to him, or the Secretary of State, to order the commissioners to visit asylums for the insane, and report thereon. County lunatic asylums were exempted. In an amended form (3 & 4, Wm. IV. c. 64 ; also, 5 & 6, Wm. IV. c. 22 ; 1 & 2, Vic. c. 73) this act was continued until 1843 (5 & 6, Vic. c. 87) ; when, among other provisions, power was granted to the commissioners to visit county asylums as well as public hospitals for the insane. The commissioners, accordingly, made a special visit to the asylums in England and Wales, the result of which was the admirable report of 1844. Bills founded upon this report, and the suggestions made by the commissioners, were successfully introduced by Lord Ashley, and constitute respectively the important Lunacy Acts of 8 & 9 Victoria, (c. 100, and c. 126.)

The former Act, relating to licensed houses (c. 100,) enacts, that eleven commissioners shall be appointed, six of whom are to be professional men—(three physicians and three barristers)—to be called Commissioners in Lunacy. The act of 1853, (16, 17, Vic. c. 96.,) entitled, "An Act to amend an Act passed in the ninth year of her Majesty, for the regulation of the care and treatment of lunatics," made still further useful provisions.

For lunatic paupers, no other provision was made, after the passing of the Vagrant Act in 1744, until sixty-four years afterwards, (48 Geo. III., c. 96.) In the previous year (1807), a com-

mittee of the House of Commons took evidence in regard to the provision made for the insane ; and Mr. Wynn succeeded in introducing a bill, as the result of this investigation, which authorized the justices of any county to take steps for the provision of an asylum, to be paid for out of a levy on the county rate. To such an asylum were to be removed those furious and dangerous lunatics who had been placed in confinement by the operation of the Vagrant Act of 1744.

Various amendments were made to this act in the years 1811, 1815, 1819, and 1825 ; (51 Geo. III., c. 79 ; 55 Geo. III., c. 46 ; 59 Geo. III., c. 127 ; 5 Geo. IV., c. 71.)

In the Act passed in the first of these years, overseers were obliged to produce a medical certificate testifying to the insanity of the patient, and returns were to be made every year, by the medical superintendent of the asylum, of the patients under his care, to the quarter sessions. In the Act of 1815, provision was made for the admission into an asylum of other than pauper lunatics, should accommodation exist ; and the overseers of every parish were obliged, when required by the justices, to make a return of the lunatics within their district.

The condition of pauper lunatics was again brought under the consideration of the House of Commons in 1827 ; and in 1828 (9 Geo. IV., c. 40) all previous statutes were repealed, and increased provision made "to facilitate the erection of county lunatic asylums, and improve the treatment of lunatics." In this act it was ordered, that an annual report should be made by the visitors to the Secretary of State and the Commissioners of Lunacy of the patients in the asylum.

In the year 1843 (5 & 6 Vic., c. 57, sec. 6), in consequence of some difficulties which arose from the action of the Poor-Law Amendment Act, several alterations were made in the details of former acts, among which it was required that the clerk of the guardians, instead of the overseers, should make the annual return of lunatics.

Three years afterwards (8 & 9 Vic., c. 126) it was found to be absolutely necessary to enact more stringent regulations for the building of county asylums. By this act their erection was made no longer optional: boroughs and counties were compelled

to provide, within a certain period, the requisite accommodation for pauper lunatics. The operation of this act, although not practicable to its fullest extent, has, on the whole, been highly beneficial.

Subsequent acts—those namely of 1847 (9 & 10 Vic., c. 84), and 1848 (10 & 11 Vic., c. 43)—were repeated by the important enactment of 1853 (16 & 17 Vic., c. 97), “An Act to consolidate and amend the Laws for the Provision and Regulation of Lunatic Asylums for Counties and Boroughs, and for the Maintenance and Care of Pauper Lunatics in England.” Since the passing of the above act, a short one was passed in 1855 (August 14), and another, consisting of only a single section, in 1856 (July 29), which, in a few particulars, amended the act of 1853.

Thus it will be perceived that legislation has been abundantly applied to the subject in recent times. So long as the machinery which is provided, and the executive which has imposed upon it the duty of carrying out the enactments made for the protection of the person and property of the insane, perform their appointed functions vigilantly, one may hope that that class which is smitten with the most grievous of human affliction, receives, as a general rule, the best care and aid which the present state of medical and psychological science admits of. It would be, we fear, beyond the truth to assert that now no private abuse, or public violation of the law, is ever permitted to find place throughout the country. Only in proportion as the real vigilant and intelligent surveillance of institutions, public or private, is maintained, the chances of the evils, which, from the character of the subject-matter, are always ready to break out, to the disgrace of human nature, will be diminished.

The two great points in the administration of the law relating to insanity, which it is essential to watch closely, are, first, that only those who are proper subjects for such treatment should be confined; and the next, that the treatment of those under confinement should be unimpeachable. The alleged Lunatic’s Friend Society, which was founded in 1845, affirms that there are now many instances of the abuses of the lunacy statutes, and that the present inspection is inadequate; and it is certain there have been some recent abuses which have been exposed, and there may be perhaps many more which greater zeal might discover. Nothing, however,

it should be remembered, can be so indiscreet and injurious to a patient as to disturb him unnecessarily with investigations which bring to himself discomfort, and to his family annoyance; whilst large discretion must, as all admit, be necessarily given to the commissioners and visitors of asylums. Yet a judicious jealousy is perhaps not a bad controlling influence for any body of public and responsible officers. Without a strict surveillance it cannot be doubted that many more cases would occur of sane and responsible persons being deprived of their liberty through the revenge, cupidity, or other unworthy motives of relatives.

We are inclined, however, to think that there are a great many persons out of asylums who ought to be *in* them, and that curative establishments might be beneficially employed for that large class, out of which springs occasionally the prisoner in our crown courts, whom we do not like to punish for a crime, and yet ought not to acquit on the unproved plea of irresponsibility.

Idiots are now educated to reason, and others, of various kinds of unsound mind, are by discipline and treatment cured and restored to society; and we believe that there is many a family cursed by some unfortunate member, over whom, did there exist legal powers sufficient to submit him to judicious control and experienced management, great advantage would ensue.

We have already referred to the statutes relating to lunacy. Into these various provisions we do not now propose to enter, nor to discuss any amendment of them; because our belief is, as we have already stated, that on the efficiency of the executive staff, rather than on the clauses of Acts of Parliament, the welfare of those suffering, or supposed to be suffering, under mental alienation, depends. Mr. C. Palmer Phillips has, moreover, in his very complete, elaborate, and useful volume, mentioned at the head of the article, presented us with an excellent view of the present law, as well as the practice relating to lunacy; indeed, all that is required on this branch of the subject by the lawyer and physician. This volume contains some hundreds of pages, and more hundreds of decided cases, classified and arranged, proving how extensive a portion of practical jurisprudence is here treated of, and how desirable it is to have a compendium of the matters embraced by the learned author.

the Law Amendment Society.

ected with insanity in England do not ap-
pon the question, whether the disease is on
what is the effect thereon of civilization.
science happily enables us now to effect
were never dreamt of. We understand,
ne predisposing and exciting causes which in-
ced the malady; and this knowledge of
al laws, when more perfectly applied, will
t in diminishing the number of those sub-
man afflictions.

OF THE SOCIETY FOR PRO- AMENDMENT OF THE LAW.

COMMITTEE ON CHANCERY PROCEDURE.

ve had before them a bill, intituled "A Bill
urse of Procedure in the High Court of
of Chancery in Ireland, and the Court of
nty-Palatine of Lancaster," which has
ommons, and has now been read a second
ords. The bill, notwithstanding its title,
jects—one enabling the court to award
as it may think fit, in cases of informa-
formance, and to try any question of fact

other measures necessary to render the
Court of Chancery what it ought to be;
y should not, on the introduction of this
Some of them were brought to the notice
address of the Council, on the opening
. We allude particularly to the mode of
ses, and to the jurisdiction of the chief

clerks of the Equity judges. If the court is to have power to award damages, it is very necessary that the damages should be ascertained in a manner satisfactory to the public. The bill empowers the court to assess damages "*in any manner it may direct*;" and gives specially to the court itself the power of assessing them, either with or without a jury, on oral evidence or non-oral evidence. To persons not acquainted with the history of the Court of Chancery, it appears inexplicable why evidence in that court is not taken in the presence of the judge who has to decide the cause; and your Committee believe the public generally, whether as plaintiffs or defendants, have a prejudice against proceedings in which witnesses are not examined in the open and unambiguous manner which has ever prevailed in our courts of common law. Nevertheless, until very recently, all evidence in the Court of Chancery, not voluntarily given, was taken within closed doors, on interrogatories prepared by counsel. For each party a commissioner and a clerk sworn to secrecy attended, and, with the witness, formed the group. The entrance to this secret chamber was barred; no human being besides those forming the group was within hearing; the commissioner read slowly the interrogatories; the answer of the witness to them was taken down in writing as it fell from his mouth, and was then engrossed and remained unpublished—that is to say, concealed—until shortly before the hearing of the cause. Under such circumstances no effective cross-examination was possible.

This mode of taking evidence, although not entirely abolished,¹ is very materially altered. This will presently appear; and it appears to your Committee, that any Act of Parliament, giving jurisdiction to the court to assess damages, ought strictly to define the principle on which the evidence should be taken. All applications for relief from the Court of Chancery may be classed under one of two heads—viz., non-contentious or contentious business. As regards non-contentious business, the court requires a right to its assistance, to be proved either by the consent of parties, or by such *prima facie* evidence as will justify the court in believing the facts alleged to be true. Neither the presence of the witness nor his cross-examination is necessary,

¹ *Vide* 15 and 16 Vict., c. 86, sec. 28.

and the system works well and cheaply; but, with regard to contentious business, the case is very different. In cases that are contested, the evidence is obtained in an anomalous manner; and, if that practice be applied to the assessment of damages, it may become even more oppressive to the suitor than it at present is. Under the provisions of the Chancery Regulation Act (15 and 16 Vict., c. 86), a plaintiff may move for a decree on affidavits (sec. 15); should he not take that course, he is obliged to give notice to the defendant whether he desires the evidence to be taken orally or by affidavit (sec. 29); but, nevertheless, the court has power to authorize affidavits to be made (sec. 36), and witnesses may, upon their affidavits, be orally cross-examined and re-examined (sec. 38).

Oral evidence, when not required by the court itself in its own presence, is taken by the examiners in the presence of the parties, their solicitors, and agents (sec. 31). Either the plaintiff or the defendant may exhibit interrogatories for the examination of his opponent (sec. 12 and 19), and the court itself has power to examine a witness on written interrogatories (sec. 28) or orally (sec. 39). It is obvious, therefore, that the Court of Chancery endeavours by various methods to arrive at the truth in cases that are contested, and recognizes no single mode of taking evidence.

The examiner, when taking evidence, is usually attended by counsel—on one occasion ten counsel were present.¹ The examination takes place in the same manner as at *Nisi Prius*, except that there is no judicial tribunal to decide on the materiality or relevancy of the evidence whilst it is being taken, and except also that it is not necessary that the evidence should be taken continuously. A written narrative in the language of the examiner, and not necessarily in that of the witness, is made by the examiner from the mouth of the witness only, and after being read to him is signed by each of them. The examiners differ as to the construction of the act,² Mr. Kenyon Parker considering that matter

¹ *Vide* Mr. Kenyon Parker's evidence—Par. 10, p. 25 of the Third Report of the Chancery Commissioners.

² *Vide* Mr. Kenyon Parker's evidence—Par. 41, p. 27, C.C.R. Mr. Otter's do.—Par. 46, p. 28, *id.*

given in evidence, not relating to the facts in issue, ought not to be included in the narrative; Mr. Otter considering that the examiner has no power to decide on any question before him, except only the legality of the question put to the witness. In any act affecting the procedure of the Court of Chancery, these doubts should be removed; for, if the examiner should erroneously reject evidence, the aggrieved party is said to be without any remedy.¹

It is not necessary that the examination should be continued *de die in diem* until it is concluded, and hence long intervals of time frequently occur before an examination terminates. This operates in two ways. Parties, during the progress of the examination, become to a considerable extent acquainted with the strength or weakness of their own case, and that of their adversaries; and consequently, before the examination is concluded, they have the opportunity of considering their position. Hence, many suits are compromised; but, on the other hand, witnesses are drilled so as to correct or unsay, on their next examination, what they have already sworn to, or fresh witnesses are produced to "bolster up" a case; and the only advantage to be set against these evils is, that perchance a fact emerges on which the justice of the case depends, which, had the examination been continued until concluded, would have remained unknown.

Probably the examination of witnesses in secret, and the non-disclosure of the evidence, until shortly before the hearing of the cause, which prevailed under the former system of taking evidence in Chancery, was intended to guard against the possibility of evidence being manufactured during the progress of the examination of different witnesses.

It appears to your Committee, that the former system of taking evidence was based too much on the apprehension that evidence might be fabricated; whilst the present system, which has been substituted for it, tends to afford facilities for its being fabricated; and that, as the Legislature is about to arm the Court of Chancery with a new power, viz., to assess damages, it ought to steer clear of both these evils, by defining the principle on which evidence should be taken. At common law, the cases

¹ Par. 246, p. 44, C.C.R. Mr. Jessel's evidence.

Important fact is suppressed at a trial are rare; to be the impression of practitioners in the courts that the least evil is to try the cause off at adjournment.¹ The general opinion of the witness by the Chancery Procedure Commissioners at the present system of taking evidence in that is very defective. One witness states, that "the present system is, the imperfection of the examiner."² Another, that "it is depriving of half its effect, by having one party to take and another to decide upon the effect of it. It is," says this witness, "to see the demeanour of another: "The judge who has to determine the whether the witness is an honest witness, or is question."⁴ Another: "It is one of the greatest of the present system of examination, that the evidence is taken for another mind."⁵ Another: "Whenever examine or cross-examine, I have always felt it the judge should see the witness, because I do not, upon paper, to convey fully to the mind of the witness for forming a correct opinion whether a witness believed or not."⁶ In cases, therefore, where the evidence of a witness, who may from his de- pected of perjury, the suitor, under the present to be without remedy, unless the court should of its own satisfaction, to examine the witness. It is, however, that the number of cases in Chancery, in the demeanour of a witness is of importance, is small;⁷ there is much evidence in Chancery proceedings is very properly brought to the notice of the court; but, unfortunately, there is no effective mode

own's evidence—Par. 120, p. 32, C. C. R.

el—Par. 237, p. 43, C. C. R.

r—Par. 99, p. 3, C. C. R.

e—Par. 321, p. 49.

d—Par. 411, p. 53.

rkins—Par. 530, p. 62.

Commissioners' Memorandum, C. C. R., p. 23.

of checking the introduction into affidavits of irrelevant matter, or of guarding against suppression of facts. It is certain that the preparation of affidavits, if done skilfully, may enable a suitor so to present his case, that the real facts cannot be known or even suspected by the court; and it does not follow that a case so constituted and fortified will be materially shaken by the cross-examination of the deponent; whereas, had he been subjected to cross-examination immediately after his examination-in-chief, he would have had no time to meditate on his evidence, and prepare himself for the searching questions of the opposing party.

The increased power proposed to be given to the Court of Chancery by the bill under consideration, will, in its exercise, be most important to the suitor; and your Committee consider that, in assessing damages, the court should be guided by some rule acceptable to the public. Are damages to be assessed in all cases by the court itself; or in some cases by the court, and in others by a subordinate officer—for example, one of the examiners, or one of the chief clerks? Or should a jury, of any and what number, of persons be summoned, in all cases, to assess damages? Should unanimity of the jury be required, or should a majority assess them? Your Committee consider that such questions should not be lost sight of, and that the proposed bill should not become law without the mode of assessing damages being clearly defined. Very grave objections, moreover, exist to piecemeal reform of the course of procedure in Chancery, the whole system of taking evidence in that court requiring, in the opinion of your Committee, the immediate attention of the Legislature. At present the suitor in the Court of Chancery has not the right of having a witness examined in the presence of the judge who is to decide the cause; whilst the expense and delay of taking evidence before the examiners is very great.¹

It appears that, if the present optional mode of taking evidence by affidavit were retained, the right to the oral examination before the judge who is to decide the cause of any witness might be conceded, the expense of oral evidence as compared

¹ *Vide* Evidence before the C. P. C.—generally. *Vide* Mr. Cookson's—Par. 646, p. 71. Mr. Williamson's—Par. 502, p. 59.

with that taken on affidavits being such that it is believed the right, if conceded, would be exercised only as against reluctant or suspected witnesses. Should this conjecture be verified when tested by experience, appeals might be heard as they are now ; inasmuch as the quantity of oral evidence would not be so great as to prevent the shorthand writers' notes being transcribed and used on hearing the appeal. It is almost certain, if a person refusing to make an affidavit were made liable to costs, that affidavit evidence would form the bulk of that used at the hearing of causes in the Court of Chancery ; and there seems no reason why the public should not be compellable to give evidence in that way as to any facts within their knowledge, the witness being at liberty to express himself in his own language.

If these suggestions be carried out by the Legislature, and especially if local courts had to a limited extent equitable jurisdiction conferred upon them, all contentious business in the Court of Chancery might be conducted without intermission at the hearing of the cause, as at *Nisi Prius*, the evidence taken on affidavit being previously briefed for counsel.

These matters have suggested themselves as pertinent to the bill under consideration ; and we think this opportunity of placing the whole system of taking evidence in the Court of Chancery on a final and satisfactory basis, should be taken advantage of by the Legislature.

II. ANNUAL REPORT OF THE COUNCIL FOR THE SESSION 1857-8.

ON presenting to the Society their Fifteenth Annual Report, the Council may once more congratulate the Members on the steady increase in their numbers, and on the prosperous condition of our finances. In two years the income of the Society has doubled, and nearly the whole of the debt incurred by the Council in 1855, for the establishment of a library, has now been dis-

charged. At the same time, the heavy liabilities for printing, incurred under former management, have been met, and the future resources of the society made available for its current expenditure. A financial statement, which has been duly audited, and which brings down our account to the commencement of the present year, together with a cash account up to the 30th of April, is appended to this Report.

The Council have had on most occasions the satisfaction of alluding to various measures of law reform, either actually passed or in a fair way towards enactment; but at the present annual meeting, owing probably to the peculiar political circumstances of the past six months, hardly any legislation has taken, or is likely to take, place. The few bills on law amendment, now before the House, are alluded to in the following pages.

At the opening of the present session of the Society, the Council took occasion to call the attention of the members to several important questions of law amendment, in the hope that they would be considered by the Society, and receive, if possible, the attention of the Legislature. These subjects have for the most part been reported on and discussed, some of them very fully, and with a minuteness which may facilitate their ultimate settlement by Parliament.

The first of these questions that may be alluded to, is the amendment of the laws relating to Bankrupts and Insolvents. The commercial crisis which occurred at the end of last autumn, and the numerous failures resulting therefrom, forcibly called the attention of the public to the practical working of this portion of our mercantile jurisprudence, and to the means suggested for its improvement and simplification. It was understood that the late Vice-President of the Board of Trade had prepared a measure on the subject, dealing rather with private arrangements between debtors and their creditors, than with the constitution or machinery of the Court of Bankruptcy; but this Bill was not introduced into Parliament previous to the vote which terminated the existence of the late ministry. Lord Brougham brought forward two measures in the House of Lords, which contemplated, among other alterations, the abolition of the Insolvency Court, of the technical distinction between traders and non-traders, and

of imprisonment for debt ; at the same time greatly increasing the powers of the Court for the punishment of fraudulent debtors, and improper trading. His Lordship stated his wish to delay further proceedings with these bills until the introduction of the measure promised by the present Government ; but as that bill has not yet made its appearance, it is evident that no legislation on the subject can be anticipated during the present year. The Committee of Delegates from Chambers of Commerce and Trade Protection Societies, appointed by the National Association in October last, have, however, completed the preparation of a measure on Bankruptcy and Insolvency, which has just been introduced into Parliament by Lord John Russell, president of the Jurisprudence department of the Association. This bill repeals all existing Acts, and consolidates the whole statute law on the subject ; it abolishes the Insolvency Court, and the distinction between trader and non-trader ; gives greater facilities for private arrangements, and provides for the registration of the deeds, and for summarily enforcing their provisions ; aims at simplifying and cheapening the proceedings under an adjudication ; confers some concurrent jurisdiction on the County Courts ; enables the distribution, by the Bankruptcy Court, of the estates of deceased debtors ; and finally enacts more stringent provisions than now exist for the punishment of fraudulent debtors. This bill has been referred to the Mercantile Law Committee of the Society, and will probably be reported on by them early in our next session.

While dealing with mercantile law, a useful measure, introduced by the Attorney-General, to render crossed cheques more secure, may be alluded to ; it is one of the few bills which will pass into law during this year.

The subject of the transfer of land, also mentioned by the Council at the opening of the session, was referred to the Real Property Committee, and received from them a long and searching investigation. They finally reported to the Society in favour of a system of Registration of Title, as calculated both to facilitate and cheapen transfer, and this opinion was maintained by the Society at several meetings, and after protracted discussion. Several bills relating to this important branch of law amendment, have been introduced into Parliament during the present

year ; one by Lord St. Leonards, for the shortening of the term of prescription, and other objects ; another by Lord Cranworth, enabling the Court of Chancery to give a judicial title to an owner of land, and to exercise powers analogous to those of the Encumbered Estates Court in Ireland—a measure which would doubtless effect one part of the object aimed at by clearing the title, but which falls short of what is desired, by omitting to supply any means for keeping the title cleared ; a third bill has been brought forward by Lord Brougham, which proposes a system of transfer similar to that so long in force with regard to copyholds. It is not probable that the time has yet arrived for a lasting and comprehensive measure on this important subject ; but the Council see with satisfaction the growing interest which it creates in the public mind, and the increasing approximation to unanimity among the advocates for real property law amendment.

The Committee which had been appointed last year to consider the subject of professional remuneration, presented their Report during the past session. The Report condemned the present mode of remunerating attorneys and solicitors as opposed to sound economical principles, and as operating unfavourably both towards the public and the profession ; and recommended a particular scheme for obviating many of the evils which accrue under the present system. The general principle of the Report was adopted by the Society by a small majority ; but as the framers of the Report felt that considerable misapprehension existed in the minds of members as to its true nature and object, they have not been anxious that the resolutions appended to it should be further considered. However important it may be to bring the principles of political economy to bear on questions of law amendment, the difficulty of applying them to the subject of professional remuneration appears to be so great, that it may be considered wiser to trust to the general progress of public intelligence, than to attempt to obtain the expression of a clear and decided opinion, on the part of this Society, on a subject of such vast importance.

In relation to procedure two important measures have come before Parliament, one of which has already passed into law. The bill, introduced by the present Solicitor-General, to enable the Court of Chancery to assess damages by means of a jury, has

de one other step towards that fusion of law and equity which the Society, some years since, recommended as the great object of law reformers ; and the bill of Mr. Atherton, "to amend the Common Law Procedure Act, with reference to the exercise of equitable Jurisdiction," is a converse measure, giving to the Courts of Common Law full powers to carry out the principle enunciated, but not sufficiently worked out, in the Common Law Procedure Act of 1854. On the former of these bills the Equity Committee have reported, pointing out that, however valuable it may be, it falls short of what is required respecting the procedure in Chancery ; that oral evidence should be taken by the Court itself, and not by an examiner ; that the Vice-Chancellors should make out their own decrees, and not delegate their proper functions to their chief clerks ; and that equitable jurisdiction should be given to the County Courts. The last suggestion is one of great importance, for it cannot be doubted that distance from the metropolis often entails on suitors, in many parts of the country, a denial of justice in matters taken cognizance of by a Court of equity alone ; but as to the practical remedy for the want some difficulty may arise, and the remark lately made by our President, that it is impossible to lay down the same money limit in equity as in common law cases, raises a question for serious consideration. This is one of the subjects which ought to be well considered by the Society in its next session.

A bill has been prepared by the Criminal Law Committee, and has been passed through the House of Lords by Lord Brougham, to make the obtaining of an acceptance to a bill of exchange promissory-note, on false pretences, a punishable offence. The want of such a provision has been already actually felt and complained of.

Another measure, drawn by a Special Committee of the Society, and which the Attorney-General has introduced into the House of Commons, enlarges the jurisdiction of the Divorce Court, by enabling that tribunal to declare the status of any person who may apply to it under the circumstances mentioned in the bill. Hitherto this form of action, though existing in Scotland as one of the uses for the action of declarator, which is applicable there as a remedy for many different wrongs, has been unknown to the

English law, which has never taken cognizance of mere personal status as distinct from the right to property. This measure will afford a means of redress in cases which, if few, are peculiarly oppressive in their nature.

Lord Brougham has also brought before the House of Lords a bill to enable prisoners to tender themselves as witnesses on their own behalf on their trial, subjecting themselves thereby to cross-examination. This measure has met with much approval, and will no doubt be in another session passed into law.

The Attorney-General has re-introduced the bills for the Consolidation of the Criminal Law, which were prepared by the Statute Law Commission, and were laid before Parliament by the late Solicitor-General, Sir Henry Keating; but these measures have not as yet proceeded further than the first reading.

Papers have been read during the past session by Mr. Serjeant Woolrych, on the Stockjobbing Act, recommending its repeal; by Mr. Edward Webster and Mr. Wakefield, on the Transfer of Land; and by Mr. George Harris, on Auditors to Trust Estates.

REPORT OF THE FINANCE SUB-COMMITTEE, MADE TO THE COUNCIL, ON THE 21ST OF JUNE, 1858.

The Committee have examined the Accounts of the Society for the Year 1857, and report thereon as follows :—

1. The Income of the Society for 1857, was—

Balance from previous year	£221	17	2
Subscriptions	£850	0	0
Arrears	64	1	0
	<hr/>		
	914	1	0
National Reformatory Union	150	0	0
National Association	20	0	0
Advertisements in Journal	25	0	0
	<hr/>		
	£1,330	18	2

2. The Expenditure of the Society for 1857, was—

Rent of Rooms and Gas	£212	7	9
Printing, Stationery, &c.	368	9	4
Furniture and Repairs	58	17	0
Salaries and Petty Expenses.....	281	17	4
Library	200	0	0
Accountant's Charges	6	6	0
Annual Dinner	9	19	6
Mr. Commissioner Ayrton's Donation to the Law School returned.....	10	0	0

£1146 16 11

3. The Receipts of the Society for 1855 amounted to £516 17 0

"	"	1856	"	995	0	5
"	"	1857	"	1109	1	0

Showing an increase in two years of more than 100 per cent.

4. The item of £368 : 9 : 4 for Printing and Stationery, includes payments for Printing in former years. The charge of £58, 17s. for Furniture, was the balance of the debt incurred in furnishing the Rooms of the Society. The £200 on account of the Library, was the second instalment of the £850 due to Messrs. Wildy for the Books now in the possession of the Society.

5. The Income of the Society for 1858 may be calculated at £1100, and the expenditure, including further instalment on Library Account, at £1000.

6. The Income of the present Year, up to the 30th April, amounted to £641 : 9 : 4 ; and the expenditure, including instalment for Library, up to the same date, to £601 : 0 : 4.

ART. XII.—RIGHT OF SEARCH.—AMERICAN STATES.

THE important concessions which appear to have been made by our government on the Right of Search, must, in a considerable degree, affect the opinions held respecting this great chapter of the law of nations. From certain proceedings that have lately taken place, and the importance of which consists, mainly, in the circumstance of the American envoy having been present, and indeed presiding, it should seem that our good kinsmen of the West regard themselves as having obtained, not merely an admission of search being altogether incident to war, and exclusively ; but also an admission of the absolute right of every nation to protect, by its flag, whatever vessel may choose to hoist it, and of the inviolability of every such vessel from all visitation, even from all question, by any but a cruiser of the nation whose flag is thus used. There can be no doubt that this is the meaning, and the only meaning, of the position which denies the right of visit as well as of search ; and it is in this sense that the exultation of our kinsmen must be understood.

At the late annual meeting of the Law Amendment Society, we were sorry to see that no lawyer from the United States attended, as had so frequently been the case in former years. Had any of these able and learned persons been present, we take for granted that they would have offered some explanation, if not made a reply, to the president's statement upon the subject in the House of Lords. Lord Brougham there affirmed, that although past all doubt the right of search is confined to the season of war ; yet that—if the United States' flag may be used by pirates, or malefactors of any description, and none but American cruisers have a right to visit, in order to ascertain that the vessel is American, there being no distinction whatever by the law of nations between great and small states—the same rule would apply to the flag of Lubeck or Monaco, as to that of America, France, or England ; and thus a common pirate would only have to hoist, instead of his black flag, the flag of Lubeck or of Monaco to be absolutely safe from all visitation, there being no kind of dif-

ference between the great and the little state, or between states having cruisers and states having none. Surely this cannot be law. Surely the obvious principle is, that upon grave suspicion a vessel, supposed to use a flag to which it has no right, may be visited so as to ascertain its national character, the party stopping her for the purpose of thus examining being answerable in damages for the detention, and even for the visit, in case the suspicions are found to have been groundless. It is as if a policeman stopping a person on suspicion, and that is found groundless; he is liable to make satisfaction; he took the risk upon himself; he did so in the discharge of his duty; he may in the circumstances be indemnified by his employers. So may the cruiser by his government, on proof that the circumstances warranted his suspicions, and that he ran the risk in the discharge of his duty. It cannot be doubted that fit and just arrangements may be made between different governments as to the manner of the visit, and the documents and other proofs to be produced in evidence of the national character of the vessels.

We have referred to the meeting lately held by the Americans in London. It was to celebrate the anniversary of the Independence; and several Englishmen attended. Nothing could exceed the cordiality expressed by those of each nation; and the minister who filled the chair, set a most commendable example of kind and respectful feeling towards the country in which he is the representative of his own government. It is to be lamented that his example was not followed by others. A speech of the most offensive kind is reported as having been made by one of his fellow-citizens, filled with abuse and sneers, defending the American encroachments, and what is called *filibustering*, by attacking the conduct of England, and ascribing all her foreign possessions to the same piratical practices. This, however, is of little moment, and such things are only of any importance as indications of a very bad spirit prevailing in the United States, not, we must hope, among persons of weight, but among the multitude; and it is devoutly to be wished that no electioneering propensities may ever make the former class bend before the latter, so as to endanger that good understanding so essential to the wellbeing of both the old country and the new.

The conduct of the United States, however, upon the question of slavery, offers a far more lamentable subject of contemplation. The influence of the Southern communities, and their determination to exert it without regard to consequences, appears to repress the exertions of the Northern states in behalf of their own principles—of the national honour; let us rather say, the character, the fair fame of the land which boasts a Franklin, the friend of liberty, and a Washington, who freed his slaves. The men of the south have openly avowed their design, not only of perpetuating the “institution” (as they call American slavery), but of reviving the African slave trade. It is in vain to deny that their strenuous activity, the enthusiasm of party, influenced by their supposed self-interest, has had not only some effect upon the colder natures of their northern fellow-citizens, but no little influence on the government itself, on those especially whose places depend upon popular election. Every friend of human improvement, and, most of all, every one who regards with interest the successful establishment of a community founded upon the most ample recognition of the people’s rights, must deprecate the degradation of its character as the heaviest blow to the cause of free institutions all over the world.¹

¹ The doubts are somewhat remarkable which it has been attempted to raise on what there is no attempt plainly to deny, that the emigration of free negroes (as they are called) from the African coast, is the transport of slaves. When Lord Derby stated, in answer to Lord Brougham, that he thought the papers shewn him by Lord Malmesbury were sufficient to prove that the *Regina Cœli’s* cargo were free emigrants, Lord Brougham declared that, on the contrary, those papers shewed her in terms to have been a slaver. There now lies before us the statement of the passengers on board the *Ethiops*, which rescued the *Regina Cœli*. It is signed by six persons, British subjects; and it distinctly affirms that the negroes “exhibited the fetters and manacles they had been brought on board the ship in (*Regina Cœli*) prior to the outbreak.”

ART. XIII.—JEW BILL

WE regard the settlement of the long-maintained controversy on this subject, as an event of great importance in the jurisprudence of England. It removes a glaring defect in our system of toleration, while it does justice, and nothing but strict justice, to a sect whose exemplary conduct, and, above all, whose munificent benevolence had long gained them universal respect.

In recording this consummation, we will not enter upon the arguments which had been used, especially in the House of Lords, to resist the adoption of the measure, year after year sent up from the Commons with increasing majorities. They resolve themselves into an assertion, that the legislature would be unchristianised if Jews became eligible ; while all men know that infidels, even atheists, had been suffered to sit in both Houses, and that they made the declaration required, "on the true faith of a Christian," not because they professed Christianity, but because to them these words had no meaning. On the same ground the Jew might have used them ; but on a principle of honour, and to be on the outside of safety as regarded a matter of conscience, he refused to avail himself of the escape, of which infidels of all classes, men who believed neither in the Old Testament nor in the New, had so long and so often taken advantage. It thus was manifest that the bigoted adversaries of toleration did not object to Jews, but only to honest and honourable Jews ; and that any one who, beside being a Jew, was a hypocrite, might enter either House, and welcome. To be sure, the topic of unchristianising Parliament became of supreme absurdity when it was recollected that one House had yearly unchristianised itself, and continued in this fallen condition, be the other House ever so tenacious of the test.

The origin of the words in the abjuration, having been inserted only as giving greater solemnity to a declaration against the Pretender, and in no possible respect pointed against the Jews, nor indeed in any conceivable sense inserted as a test of Christian belief, has often been dwelt upon as decisive in this controversy. But it does not appear that sufficient

stress was ever laid on the very obvious position, that what is the "true faith of a Christian," is any thing rather than a thing settled among Christians themselves; and that men daily make use of the words, who, though calling themselves Christians, and maintaining that their faith is the true faith, are nevertheless notoriously members of sects whom our church regards as any thing rather than Christian. Take the Unitarians or Socinians, we might say the Arians also; but of the Unitarians there are numbers who sit in both Houses, and are known to be such. What says the law, that is, the church, regarding their belief? We are commanded by our liturgy to regard these persons as in a state of utter perdition on account of their belief. We again and again, in the course of the year, declare, in the most solemn manner, that those persons "shall without doubt perish everlastingly," because of their belief being different from that "true faith of a Christian," for refusing to affirm which the Jew was excluded from Parliament. Nothing further is required to shew the utter inconsistency of those who proclaim our faith to be so clearly settled, and so well understood, as to afford the means of taking an avowal of it for a test.

But we pass over the whole argument on the question, to arrive at what really appeared, and we may add, proved decisive, that when the statutes came to be considered, as well as the Parliamentary precedents, the much-vaunted clause in the abjuration was found wholly inefficacious to exclude Jews from the most valuable privileges, the most precious rights, and even the most important functions, of members of the legislature. This was, to a certain degree, broached in the argument in the Courts upon Alderman Salomon's case; but the attention of the House of Commons was very lately called to it, as well as that of the Lords. We do not mean to affirm, that regularly a person elected to the one House, or summoned by writ to the other, enjoys these rights, and can perform these duties; but we assert, and this was quite sufficient for the case where the two Houses differed irreconcilably on the admission of Jews, that unless the Commons chose to prevent it by a censure, or a threat of expulsion, a Jew, without taking his seat, had all the privileges of Parliament, and could exercise by far the most important duties of a member.

He could sit under the gallery during all debates ; he could frank before that privilege was surrendered ; he had entire personal protection as much as if he was sworn ; and he could sit and vote in all committees. He could be chairman of an election committee, and, by his casting vote, determine upon a seat ; so he could in any committee upon a bill, whether public or private. He could be appointed to manage a conference with the Lords, as he could accompany the Speaker in his appearance there, or in presenting an address to the Sovereign. It was found that a hundred and twenty years ago an eminent member (Sir Joseph Jekyl) had been chosen upon a committee before taking his seat, and it availed nothing to cavil at this precedent, and to question whether he did act on the committee ; for the matter rests upon the contents of the statute, and not upon precedent alone. No one in the House of Lords ventured to deny this when Lord Brougham referred to the terms of the act. One section (1 Geo. I., c. 13, s. 15) prohibits sitting and voting without taking the oaths ; the next affixes the penalty incurred for voting, and says, "for such offence." Now, there is no offence described except that in the former section ; and it is the prohibition to vote in the House. But voting in committee is not voting in the House ; the greatest care being taken, in directing the administration of the oaths, to decide that the House is to be sitting and the Speaker in the chair. The highly penal nature of the sections, involving not merely the £500 penalty, which still remains, but all the heavy forfeitures and disqualifications which Lord Lyndhurst's act of 1852 swept away, makes it perfectly manifest that the strictest possible construction must be applied to them, and that consequently these penalties only apply to voting in the House.

Great praise is due to Mr. T. Duncombe¹ for having called the attention of the Commons to this point, and he followed it up by moving that Baron Rothschild should be appointed one of the

¹ If any one should be thoughtless enough to place Lord Lucan next to Lord Lyndhurst in effecting the change, we must at once say that nothing can be more absurd. Lord Lucan is hardly even to be mentioned in the history of the question. Mr. T. Duncombe undeniably comes next to Lord Lyndhurst in the matter. Lord Lucan had about as much hand in carrying it as Lord Cardigan had in opposing it.

conference to meet the Lords upon the difference between the two Houses. It really seemed wholly impossible after this, that the residue of the disqualification should be obstinately retained.

That a great gain to the cause of religious liberty has been effected by Lord Lyndhurst's constant, untiring, most able, and most judicious exertions, must be admitted on all hands. That Lord Lucan's conversion to the right side was of advantage, is not denied; that his bill did some service, by affording the government a kind of ground for saying they retained their opinions, and only yielded to the necessity of putting an end to the struggle with the other House, and that, therefore, they did not support Lord Lyndhurst's bill, but another, may likewise be granted. The two bills differed in some particulars, but both admitted the Jew to sit in Parliament. Lord Lyndhurst's had every advantage in comparison with the other; which was so altered in committee as ultimately to be in substance the same with his. We must, however, protest against the injustice of calling this important measure by any other name than Lord Lyndhurst's. It will be more absurd than the misnomer of America after Vespucci. To be sure, Lord Lyndhurst shewed the greatest self-denial and forbearance when he contented himself with pointing out the gross errors in Lord Lucan's bill, and declared that all he desired was the success of the measure, careless by what bill it was brought about. We doubt if others in like circumstances would have shewn the same temper; for instance, Lord Campbell, had Lord Lucan or Lord Cardigan stepped in at the eleventh hour with a bill on obscene publications; or Lord Brougham, if his evidence bill had been thus interfered with by the same or any other military personages.

Great complaints have been made of the government in this whole matter; some groundless, others not without foundation. Of the former class is the describing their concession as founded on false pretences, because, unlike the yielding on the Catholic question and the corn-laws, this concession has been made when there was no demand for it by the public feeling. But we hold the Duke of Newcastle to have taken, as he generally does, the sound view of the subject, when he considered the termination of a controversy between the two Houses, in which, moreover, the friends of toleration took

part with the Commons, as no less sufficient justification than motive for the change. The real charge against the government, and, let it be added, against the House of Lords, is the gross absurdity of sending down to the Commons peremptory reasons against admitting the Jew, at the same time that they were asking their consent to a bill for his admission.

It remains to be observed, that those are greatly mistaken who imagine the whole benefit conferred upon the Jewish people to consist in the measure by which some three or four of their body will now have seats in Parliament. Alderman Salomons, at the late meeting of the Law Amendment Society (of which he is a member, having indeed been called to the bar), set this matter right. He declared that the whole Israelite race was now relieved from what had been regarded by the world, and felt by themselves, to be a stigma—their exclusion from a share in the legislation of their country by a nation, the first in the rank of those who profess the principles of civil and religious liberty, and the main stay of constitutional government.¹

ART. XIV.—THE MINISTRY OF JUSTICE AND THE STATUTE LAW COMMISSION.

THESE cardinal questions, upon which hang the success of all questions of Law Reform, and all hope of consolidating the judicial institutions and the law of the country, are in *statu quo ante bellum*, in the same state in which they were last session, when the Whigs were in office and the Tories in opposition—in the same state actually, retrospectively, and prospectively: there is nothing new to be said of them, in respect of what has been done, is doing, or is likely to be done.

¹ Among the arguments—if to be dignified with such a name—against the Jews, was the appeal of a noble Lord (De Roos) to the fact of their not serving in the army, whence, by parity of reason, it may be presumed his lordship would exclude all members of the Society of Friends!

With respect to the former question, that of the Ministry of Justice, the Chancellor of the Exchequer has intimated that he is willing to move the requisite grant, if any body will define what a Ministry of Justice is to do.

With respect to the latter, the Attorney-General has claimed and obtained the continuance for another year, of the grant to the Statute Law Commission, on the blind faith of what has been done.

He has intimated, indeed, that he desires to obtain a committee, to lay a sample of the work before the committee, and to take the sense of the House thereon ; and also on the expediency of an officer to undertake the parliamentary revision of current legislation.

Is it not singular that nobody seems to perceive that the solution of both of these questions is the presentation of a design for the work, which shall show the scope and bearing of the different parts, the diverse kinds of qualification requisite for the work, the order and course of proceeding for the doing, and the apportionment, of the work, in such form and manner that all parts may proceed *pari passu* ?

Is it not strange that we still refuse to entertain in the Commission, or elsewhere, the suggestions of the very men who have, for the longest time, and with the greatest perseverance, prosecuted this subject ; that we do not obtain in detail their suggestions ; that we do not bring together the various plans and collate them ; that we do not publish the ninety-three statutes that are said to be consolidated, and take the sense of the profession and the public thereon ; that we do not establish a fit board of reference to receive, examine, consider, and determine the questions of difference ; but proceed year by year, granting money grudgingly and reluctantly, with parsimonious extravagance, and with the assurance that no practical good can result beyond collecting, in a sort of way, a quantity of *materiel* which may afterwards turn to account ? for this is one of the pleas put forth on behalf of the Commission, as if, after so many examples of the sort of work already done in this country and elsewhere, the matter should be any longer the subject of empirical experiment.

Under the direction of an office or department of state,

properly constituted, this sort of business would have its daily routine ; its processes would also come to be settled, and deference would be shewn to the Minister in charge, let that Minister be the Lord-Chancellor, the Attorney or Solicitor General, or the Lord Privy Seal, or any other convenient personage.

The truth is, this business wants a local habitation, where the records of legislative projects may be kept, and where the various officers of State, greater and less, may meet in deliberation to dispose of matters of legislation in their preparatory stage.

The Lord-Chancellor has no office, nor has the Attorney-General, nor the Solicitor-General. If they meet it is in odd places and at odd times, by chance, in the courts, in the House of Lords, at dinners, or may be at evening parties, or at best at occasional appointments at one another's houses ; and the results of their deliberations are not recorded, and each minister has to begin the task which his predecessors have half matured.

When the matter comes before Parliament, a few generalities are advanced on each side—details are eschewed ; the question being altogether one of detail, party men hang together, and the House literally acquires no information on the subject.

We ought to have a fair and honest *resumé* of the whole matter, embodying, as far as they are compatible with each other, the various suggestions, shewing the organization of the department, its jurisdiction, its procedure, and the very forms which it is proposed to use.

If next year we have a committee, as proposed by the Attorney-General, the matter will not be in a state to be submitted to that committee ; the inquiries will branch out into various irrelevancies, and the session will probably terminate with a recommendation to renew the inquiry in the next session.

The next session will come with its own proper exigencies, and postponement after postponement will follow.

We contend that without a basis of operation, well considered, this operation will be no more successful than any other operation, and that we shall in the end spend in dribblets, during a long period of disheartening work, as large a sum of money as would be sufficient to enable us to do the whole work well in a short time, and to general satisfaction.

If, on the other hand, we proceed upon well-considered designs, founded on a collation of past, existing, and proposed designs, with working plans, with specifications of detail, with estimates of the cost of each operation, and the time which it will occupy, and proper engagements with competent persons to do the several parts of the work, and this within a given period, and in a public manner, every body will become familiar with the nature of the undertaking; public opinion will stimulate and check, sanction and support the effort, and the work will proceed without let or hindrance from any quarter, till, in a comparatively short time, it will be found to be entirely done.

The day of eulogy and blind faith has passed away. It is well known that the work already done cannot encounter the scrutiny and criticism of those who have made this subject the study of their lives: and, notwithstanding the show made in parliamentary appearances, it is well known that the whole body of the Commission are not in accord upon this subject, and that nothing but the secrecy observed in its operations has enabled it to endure so long.

The proceedings of the Commission, which were laid before Parliament at the beginning of the session, should be perused, in order to shew how necessary it is that that body should be reinforced at all points, or that its functions should be placed directly under the Chancellor, assisted by a committee of privy council, and the usual staff and organization of an office, dealing regularly with the matter, and with some definite responsibility.

It is manifest that before a committee of either House of Parliament can determine the question of the right mode of consolidating the law, and the right mode of revising current legislation, it must consider (which the Statute Law Commission has hitherto omitted to do) the various plans hitherto adopted or rejected.

This is the shortcoming of the Commission; they may have collected, in the form of ninety-three consolidated bills, half the statute law; but if these are so written as not to piece on with one and another, and with the general law, nor admit of future incorporations—if they fail in the very purpose of a consolidation to bring together in logical order, and connectedly, all the matter relating to the same subject—if they have neither plan nor purpose—if

they are worse than any code that exists, unintelligible to lawyer as well as layman—if they ignore system, and defy proof—if they comprise matters which do not belong to them, and do not contain all the matters that do—they do not satisfy the fair demands of the public, nor justify the claims that are made in their behalf. Eulogies of the Commissioners, collectively and individually, assertions of what has been done, of the sacrifices made by this Commissioner, and of the learning and accuracy of another, are beside the question. What, on the very face of them, are the consolidated bills? where is the scheme of the Commission? what are its plans? where are the estimates of the future expense? where are the means of vouching the accuracy of the work? why are not the ninety-three bills produced to Parliament, and subjected to public criticism?

These and many other questions might be asked, and the true answers to such questions would constitute the material upon which a just judgment might be given on the present state of matters.

The production of the work, however imperfect, would be better than the holding it back for an indefinite period. It would give opportunity for criticism and defence, and would enable the Commission to obtain the sanction of public opinion, for the want of which its proceedings are so hesitating.

Without principles, without a definite purpose, without design, without plans, without specifications, without estimates, without the strength that comes from a knowledge of one's position, and that of one's opponents, it is impossible the Commission should realize any thing, or make reasonable way; and, though they gain annually a vote, it is but to forestall credit, and to earn for their proceedings a degree of ultimate discredit, which will be damaging to the Commissioners themselves, and, perhaps, peril the work altogether.

The Commission wants not in fact money, so much as it wants very body and soul—a purpose, and arrangements conformable to, and efficient for, the purpose. It is not much work that is required, but work well, comprehensively, and fitly done; and work proceeding upon design has this advantage, that from the very outset we see the end to be attained, and how the intermediate proceedings contribute to that end. This is the immediate

requirement of the members of Parliament ; they desire to have this explanation—not to be worked out by a committee of their own body, which is a dilatory, operose, and ineffective instrument for detailed operations, but by the Statute Law Commission, or some such body, which would be unfettered by times and seasons, and could submit the whole scheme at once and connectedly, in a practical shape, which should constitute the basis of the operations of the committee, if afterwards a special inquiry should be necessary.

A masterly exhibition of the whole matter, concisely, connectedly, and intelligibly done, would advance this subject fifty years, and would redeem the credit of the Commission, which has suffered so much by the manner of proceeding hitherto.

Between the present time and the next session, steps might be taken to put the matter on a satisfactory footing ; but this cannot be done but by the adoption of a system of comprehensiveness, which fairly takes into account all sides of the question, and those matters which, in this publication and others, have been put in controversy during the last six years, to say nothing of a period long antecedent.

Let somebody be charged with the duty of collecting methodically and fairly these matters, presenting them honestly to the Commission, to the Government, to the Parliament, and to the Public, and all practical difficulty will be removed. Comprehensiveness, method, and publicity are the three guarantees of success in this matter, without which we must suffer for ever the consequences of cliqueism, confusion, and the narrowness and sinisterness of secrecy.

The Attorney-General has installed himself the arbiter of this work. He claims credit for sagacity, for firmness, for energy. Let him consider whether, without making an entire change upon the past course, he may not so modify his proceedings as to make his position impregnable. The considerable minorities in the House of Commons ought to be an index that something is wrong. He will see that the majority, a few nights ago, consisted both of the members of the late and the present government, for the most part committed to the Statute Law Commission, and that some of the minority were on circuit.

From our knowledge of the feeling of the independent members on this subject, we should say that their desire is to obtain entireness and fair play, and that, if they could be satisfied that this work would be honestly done, they would aid rather than oppose the Commission ; but of all the products of the labours of the Commission none have been laid before the House, and the minutes of proceedings manifest a degree of disorder, irresolution, and general inattention in the Commission, that makes it too clear that nothing successful can eventuate from its exertions so long as it is conducted after the present fashion.

We believe that there is not a single Commissioner to be found, who, if placed in a witness box, and subjected to an examination, cross-examination, and re-examination by the Attorney-General, or by any other discreet and firm barrister, would vindicate the proceedings, plans, and prospects of the Statute Law Commission.

The manner of its working, the want of instructions, the habit of confiding the work to a few, principally young men, without the control of the general body, and without preparing their materials in such a manner as to vouch their work, so as to admit of its being properly examined, are all well known in the profession, and matter of good-humoured raillery in some cases, and not a little severe remark in others.

It is a pity that so good a purpose should be spoilt by an obstinate adherence to a manner of proceeding that cannot be justified by any man of business acquainted with the special exigencies of this subject, and the manner in which they may be met by appropriate and effective expedients.

ART. XV.—THE TRINITY TERM EXAMINATION PAPERS.

ON the 19th, 20th, and 21st days of May last took place, at Lincoln's Inn, the Public Examination of Students of the Inns of Court, being candidates either for a certificate, preliminary to being called to the Bar, or for the Studentship (of fifty guineas per annum, tenable for three years), or for honours. The nature and mode of conducting this examination were explained on a former occasion;¹ its subjects appear from the following programme:—

The Reader on Constitutional Law and Legal History will examine on the following subjects:—

He will expect the candidates for Honours to be well acquainted with the chapters in Mr. Hallam's Constitutional History which give an account of the reign of Elizabeth and of the Stuarts; of Queen Anne; and of George the First and George the Second.

He will expect them to be acquainted with the History of the Law of Real Property; the History of the Law of Libel; the History of the Law of Treason; and with the History of our Constitution from Magna Charta to the Bill of Rights. He will expect them also to be acquainted with the most remarkable State Trials, from the accession of Elizabeth to that of George the First.

He will expect all who present themselves for examination to possess a competent knowledge of the leading events of English History.

The candidates for a Pass will also be required to possess an accurate knowledge of the Reigns of Elizabeth and of the Stuart Kings; with the events of the Revolution; and with the State Trials during the Reign of Charles the Second.

¹ See the *Law Magazine* for August, 1855.

The Reader on Equity proposes to examine in the following books:—

1. Smith's Manual of Equity Jurisprudence; Mitford on the Pleadings in the Court of Chancery. Introduction:—Chapter 1, sec. 1 and 2; chapter 2, sec. 1; chapter 2, sec. 2, part 1 (the first three pages); chapter 2, sec. 2, part 2 (the first two pages); chapter 2, sec. 2, part 3, chapter 3. The Act for the Improvement of the Jurisdiction of Equity, 15 & 16 Vict., c. 86.

2. The Cases and Notes contained in the first volume of White and Tudor's Leading Cases; and the Cases of *Ashburner v. Macguire*, *Townley v. Sherborne*, *Brice v. Stokes*, *Harding v. Glyn*, *Casborne v. Scarfe*, and *Peachy v. Duke of Somerset*, in the second volume, with the Notes on those Cases.

Candidates for Certificates of having passed a satisfactory examination, will be expected to be well acquainted with the books mentioned in the first of the above classes.

Candidates for a Studentship or Honours will be examined in the books mentioned in the two classes.

The Reader on the Law of Real Property proposes to examine in the following books and subjects:—

1. Joshua Williams on the Law of Real Property, fourth edition.

2. Particulars and Conditions of Sale; Sugden's Vendors and Purchasers, section 2, pp. 11—34, thirteenth edition; or, Dart's Vendors and Purchasers, cap. 5, pp. 68—112, third edition.

3. The Common Forms of Assurance on the Purchase and Mortgage of Freehold and Copyhold Estates and Leaseholds for years.

4. The Effect of the Disclaimer and Acceptance by Trustees of Trust Estates; Lewin on Trusts, part 2, cap. 10, third edition.

5. Hayes on Conveyancing. Chapters 1—4, fifth edition.

Candidates for Honours will be examined in all the foregoing subjects; candidates for a Certificate in those under heads, 1, 2, and 3.

The Reader on Jurisprudence and the Civil Law will examine candidates for Honours in the following subjects:—

1. The Elements of the Roman Law of Dominion, Servitudes, Mortgages, and Contractual Obligations. Mackeldey, *Systema Juris Romanis Hodie Usitati* (Latin Edition), pp. 249—428.

2. International Rights of Independence, Equality, and Property. Wheaton's Elements of International Law, part 2, chaps. 2, 3, and 4.

3. *De Verborum Significatione* and *De Regulis Juris*. The last two titles of the Digest.

Candidates for a Certificate will be examined in:—

1. Sandars's Institutes of Justinian, books 3 and 4; and also the first nine titles of book 2.

2. International Rights of Equality and Property. Wheaton's Elements, part 2, chaps. 3 and 4.

The Reader on Common Law proposes to examine in the following books and subjects:—

Candidates for a Pass Certificate will be expected to be familiar with the ordinary steps and course of Procedure in an Action at Law, and will be examined in—

1. Serjeant Stephen's Commentaries, fourth edition, book 2, part 2, chap. 5. "Of Title by Contract."

2. Those portions of Archbold's Criminal Pleading (by Welsby), which treat of the Law of Homicide and Simple Larceny.

3. Taylor on Evidence (last edition), vol. 1, part 1. "Of the Nature and Principles of Evidence."

Candidates for the Studentship or Honours will be examined in the above books and subjects, and also in—

1. The undermentioned Cases from Mr. Smith's Selection of Leading Cases (fourth Edition), with the Notes thereto:—

Armory v. Delamirie—*Calye's Case* (and in connection therewith, *Dansey v. Richardson*, 3 Ell. and Bl., 144. *Cashill v. Wright*, 6 Id., 891); *Lampleigh v. Brathwait*; *Mitchell v. Reynolds*; *Semayne's Case*; *The Six Carpenters' Case*; and *Simpson v. Hartopp*.

2. Chitty on Contracts (last edition), chap. 2. "Of Contracts with Particular Persons."

Having reference to the books and subjects above indicated, the following questions were proposed:—

Questions on Constitutional Law and Legal History.

1. What measures did Elizabeth take for binding the Church to the State?
2. What explanation did Elizabeth give of the Act of Supremacy?
3. Mention the names of some of the most remarkable clergymen (not Roman Catholics) who refused to comply with the ceremonies established in her reign.
4. Give an account of Udal's trial, with such observations as occur to you.
5. What were the admitted constitutional rights of the Commons during the reign of Elizabeth?
6. What was the first statute by which Roman Catholic recusants were distinguished from other recusants?
7. State any proofs of the increasing influence of the Commons during the reign of Elizabeth.
8. What part was taken by Bacon, as a Member of Parliament, on the question of originating Money Bills in the same reign?
9. When were military tenures abolished?
10. What was the case of *Ashby v. White*?
11. What was the law of evidence in cases of Treason at the death of Charles the Second?
12. Mention any case in which it had been set aside by the Judges.
13. Give an account of the Test and Corporation Acts.
14. State the causes of Lord Clarendon's disgrace.
15. How long did Charles the Second govern without Parliaments?
16. What were the limitations of Prerogative in the Act of Settlement?
17. What measures were taken in Queen Anne's time to exclude placemen from the House of Commons?
18. Give an account of *Bushel's case*, and of the Habeas Corpus Act.

19. When was the distinction of the Cabinet from the Privy Council fully established?

20. Give an account of the Peerage Bill introduced by Lord Sunderland in the reign of George the First, of the fate it met with, and the object it had in view.

21. Give an account of Sir R. Walpole's Excise scheme.

22. When was the Septennial Act passed? on what grounds was it justified? State such reasons as occur to you in favour of or against it.

Equity.

1. Explain the origin of the jurisdictions exercised by Equity Judges over infants and lunatics; in what judges are such jurisdictions vested; and in what manner are they conferred?

2. What suits are properly commenced by information? In whose name is an information filed—and, in case the information is dismissed with costs, by whom are the costs to be borne?

3. What is meant by the extraordinary jurisdiction of the Court of Chancery: about what time does it appear to have been established: and what other jurisdiction is inherent in the Court?

4. Distinguish between a bill and a petition in equity; and state generally what are the proper objects of each.

5. Explain the method of taking evidence in Chancery; and mention the principal advantages and disadvantages with which this method is accompanied.

6. A plaintiff states a title, dependant on his being the heir of A. B., and alleges that the defendant in conversation admitted the fact of such heirship. The defendant puts in a plea simply denying that the plaintiff is heir of A. B. Is the plea sufficient?

7. Is a demurrer which is good to the relief prayed by a bill, good to the discovery also? State the reason of the rule upon this subject.

8. An agreement relating to personal property is entered into, reduced into writing, and signed by the parties. By mistake, a material term of the agreement has been omitted. A bill is filed by the one party to enforce the agreement really entered into,

and another bill is filed by the other party to enforce the written agreement. What decree will be made in each case?

9. A. conveys real and assigns personal estate to trustees upon trusts for sale and distribution of the proceeds amongst the creditors of A., named in a schedule to the deed. The creditors are not parties to the deed, but are informed of its existence. After the sale has taken place the trustees, at A.'s request, hand over the proceeds to him. Are the creditors entitled to any relief in equity against the trustees?

10. A person entitled to a sum of stock standing in his own name, and to another sum standing in the names of trustees for him, assigns by deed both sums, in consideration of natural love and affection, to his son. The deed of assignment is delivered to the son, but no notice of its existence is given to the trustees. Upon the decease of the assignor his personal representatives claim the stock as part of his personal estate. The son insists upon the deed of assignment. Who is entitled to the stock?

11. A sum of stock is vested in trustees upon trust for A. during his life, and after his decease upon trust for B., a married woman, absolutely. C. is desirous of purchasing her and her husband's interest in the stock. In what manner must the transaction be conducted in order that the purchaser may be secure? Point out the dangers against which it is necessary to guard.

12. In what case is the distribution of a fund devoted by will to charity directed by sign manual?

13. Explain what is meant by a superstitious use; and mention the statute to which reference is made for the purpose of determining whether a use is superstitious. What is the leading provision of the statute, and is it prospective in its operation?

14. Explain and illustrate the rule—the assignee of a chose in action takes it with all the equities attached to it. Should any exception be made in the case of a fund vested in a trustee?

15. A. enters into a written agreement with B. to sell him a certain estate, describing it as copyhold. A. afterwards discovers that it is freehold. Can B. enforce specific performance of the contract?

16. In what respect does the authority of an executor differ from that of a trustee with reference to personal estate vested in

himself and a co-executor, or a co-trustee respectively? And what is the origin of the distinction.

17. C. enters into a valid contract with A. to guarantee the payment of a debt due from B. to A. A. subsequently, without the consent of C., concludes a binding agreement with B. to give him further time for payment, but stipulates with B. that A.'s claim against C. shall not be in any way affected by the transaction. Is C. released from his guarantee?

18. A testator gives a legacy of £100 to A. out of the £3 per cent. consols standing in his (the testator's) name; and he gives £100, part of the said £3 per cent. consols, to B. The testator afterwards sells all the stock standing in his name. Are A. and B. entitled to their legacies? How are such legacies described?

19. A. mortgages Whiteacre to B. for £1000; and afterwards mortgages Blackacre to B., in consideration of a further sum of £1000. C., who has notice of the former mortgages, advances money to A. on a mortgage of Blackacre alone. Wishing to enforce his security, he files a bill against A. and B. To what decree is the plaintiff entitled?

On the Common Law.

1. Explain what is meant by the terms "contract," "consideration," "nudum pactum."

2. Give instances of "implied" contracts, and put cases illustrating the maxim *Expressum facit cessare tacitum*.

3. Define the contract of sale. What peculiar efficacy attaches to a sale of goods in market overt.

4. What is the mode of commencing an action against a British subject resident abroad?

5. In what cases may the sheriff execute a writ by breaking open the outer door of a dwelling-house?

6. Under what circumstances and to whom is the privilege of stopping goods *in transitu* allowed, and how may this right be defeated?

7. State shortly the rule laid down in *Mitchell v. Reynolds*, as to the validity of contracts in restraint of trade.

8. Illustrate the maxim, *In pari delicto potior est conditio possidentis* or *defendentis*, by reference to a policy of insurance.

9. State the point decided in *Dalby v. The India and London Life Assurance Company*, 15 C. B. 365, relative to a life policy of insurance.

10. Under what circumstances was an action of trover held maintainable in *Armory v. Delamirie*? And what point was there decided in regard to the measure of damages?

11. Is it in your opinion necessary to show that the taking was *lucri causâ* in order to sustain an indictment for larceny? Put cases *pro* and *con* in support of your views on this subject.

12. When may the writ of summons be specially indorsed? And what advantage may be gained by specially endorsing it?

13. Under what circumstances will a *feme covert* indicted for larceny be entitled to an acquittal, although proved to have taken the goods laid in the indictment *animo furandi*?

14. Discriminate between the functions of the judge and jury where, in an action for libel, the question arises whether a particular communication was privileged or not.

15. What things are privileged at Common Law from being distrained upon for rent?

16. Specify the rules of law applicable in determining the criminal liability of an infant under the age of twenty-one years.

17. State shortly the leading exceptions to the rule, that a corporation can only bind itself by contract under its common seal.

18. Illustrate the presumption of law *omnia rite esse acta*.

19. In what cases may a bankrupt sue upon a contract entered into with him whilst uncertificated?

20. What points were decided in the *Six Carpenters' Case* as to liability for a trespass *ab initio* by relation?

21. By what considerations would you determine the liability of a member of a club for the price of goods supplied by a tradesman to the club? Cite cases having reference to this subject.

22. State the facts in *Smout v. Ilbery*, 10 M. & W. 1, and explain fully the reasoning upon which the Court rested their judgment in that case.

23. Illustrate the maxim, *Ignorantia juris quod quisque scire tenetur neminem excusat*, by reference (1) to the Law of Torts, (2) to Criminal Law.

On the Law of Real Property.

1. Give the form of a grant by deed of fee-simple estates from A. to B. C. and D. as tenants in common in fee, and from A. to B. C. and D. as joint tenants in fee.

2. A testator wishes to devise all his real estate to his son William, and all his personal property to his son John; what form of words would you use in such a devise and bequest respectively, that there might be no doubt as to which son would be entitled to the testator's leaseholds for years? Give the name of the important case which has been decided on this point.

3. What is the difference between the old and new Law of Wills as to the necessity in devises of fee-simple estates for words of inheritance? Give a few of the words descriptive of property, which, if used in a will (whatever its date), would always have passed the fee without words of inheritance.

4. On what day did the new Dower Act come into operation? Give the common uses in bar of dower in a conveyance of fee-simple lands to a purchaser married before that day. Explain the operation and effect of those uses. What is the effect of a late decision as to the common dower uses in a conveyance made before the day on which the Dower Act came into operation, on the dower of a woman married to the purchaser after that day?

5. To what statute do estates-tail owe their origin? What, before that act, was the nature, and what were the incidents, of the estate created by the same words as would now create an estate-tail?

6. Fee-simple lands are by a settlement, dated before the year 1834, conveyed to a grantee to uses and his heirs, to the use of Mary, a married woman, for her life, for her separate use, remainder to her first and other sons successively in tail: Who would be the proper parties to a disentailing deed, to be executed in the present year, of the estate-tail created by the above settlement? In other words, do Mary and her husband, or does Mary alone, or her husband alone, fill the office of protector of the settlement?

7. Can a tenant in tail in possession make a good equitable mortgage which would bar the issue in tail of the entailed lands,

by a mere deposit of the title-deeds, with or without a memorandum in writing? Or, is any, and if any what, kind of assurance necessary?

8. What facts or circumstances will make binding on a debtor, and all persons claiming under him, a deed of conveyance and assignment by the debtor to trustees for the general benefit of creditors, which deed was voluntary on its execution?

9. Is it possible to settle upon a male real or personal estate (not his own at the time of settlement) in such a way that his creditors may have no power over that property? Is there any difference between a trust for a male *until* he shall become bankrupt or insolvent, and a trust for a male for life, with a proviso defeating his life interest on his bankruptcy or insolvency?

10. What is a reputed manor? Prior to what time must the origin of all copyhold manors be referred, and why? To what point of time is the commencement of legal memory referred, and why?

11. What are "*tortious*" and "*innocent*" assurances respectively? Has any assurance at the present day a tortious operation? Give the authority for your answer.

12. Grant by deed of fee-simple lands to A. and his heirs, to the use of B. and his heirs; devise by will of the same lands to A. and his heirs, in trust for B. and his heirs; where is the legal estate in each of these examples? Does the learning of uses apply to devises by will?

13. Give examples of cases in which deeds, inoperative to pass the fee-simple in the manner originally intended by the framers, have been held operative in another character.

14. What kind of property (before 1838) would have passed by an unattested will? How many witnesses are now necessary to a will? Are unattested wills now good under any, and if any what, circumstances?

15. Give the rule in Shelley's case as to fee-simple estates. Is there any analogous rule with respect to personal estate?

16. Define a contingent and a vested remainder. What is the difference between a reversion and a remainder?

17. What exceptions are there to the general rule, that all interests in land must be created or evidenced by writing?

18. A. sells and conveys to B. the following estates respectively :—I. An unencumbered fee-simple estate. II. The equity of redemption of a fee-simple estate. III. A leasehold estate for years at an annual ground-rent. Give the heads of the covenants usually entered into by A. and B. respectively in each of the above deeds of transfer.

19. Give the heads of the common conditions produced by the vendor on the offering of a fee-simple estate for sale by auction in several lots. On the sale of leaseholds for years, what is the most necessary and important special condition of sale ?

20. What is the best form of and the best time for a disclaimer of an estate or a trust ? Can a married woman disclaim an estate in land, and in what manner ? Can a trustee, after accepting the trusts of a settlement, retire from the trusteeship under any and what circumstances ?

Jurisprudence and the Civil Law.

1. Define Dominion. In what is the Roman conception of Ownership distinguished from that of English Real Property Law ?

2. Describe the modes of acquiring Dominion known as Occupancy, Specification, Accession, and Usucapion, and state what conditions must be satisfied in order that, in each case, Dominion may be completely acquired.

3. What is the office of Tradition in Roman Jurisprudence, and what is meant by saying that Tradition is in itself a neutral act ?

4. Define a Servitude, and distinguish a Prædial from a Personal Servitude, and both of them from a Personal Obligation. Explain the rule that Prædial Servitudes must have a perpetual cause.

5. What was the nature of the form of ownership called Emphyteusis ? Whence arises its importance in the history of Law ?

6. Enumerate the general rules of Roman law which govern the priorities of mortgage creditors. What is the Jus Offerendi ?

7. Define an Obligation ; distinguish it from a Pact and a Contract, and state what are the ingredients of a Contract according to the views of the Roman Jurisconsults.

8. State the general rules of Roman Law with reference to the cases in which the author of Damage is bound to pay for such damage. Define *Culpa Lata*, *Diligentia*, and *Custodia*.

9. In a contract of sale, what duties does the Roman Law impose on the Vendor apart from special agreement?

10. What is the extent of the international right of innocent passage on Rivers? Illustrate your answer by examples.

11. What are the *King's Chambers*, and what sort of jurisdiction does Great Britain assert over them? What amount of jurisdiction does the *Hovering Act* assume?

12. What was the nature of the title which the plaintiff was bound under Roman Law to establish; (1) in a common real action; (2) in a common personal action; (3) in the *actio exhibendi*; (4) in the *actio de peculio*?

13. Explain the meaning of the following definitions and rules of Roman Law:—

a. *Rei appellatio et causa et jura continentur.*

b. *In generali repetitione legatorum etiam datæ libertates continentur.*

c. *Potest reliquorum appellatio et universos significare.*

d. *Usura pecuniæ, quam percipimus, in fructu non est, quia non ex ipso corpore, sed ex aliâ causâ est, id est, novâ obligatione.*

e. *Magna negligentia, culpa est; magna culpa, dolus est.*

f. *Semper in obscuris, quod minimum est, sequimur.*

g. *Nuptias non concubitus, sed consensus, facit.*

h. *Ea quæ raro accidunt, non temere in agendis negotiis computantur.*

i. *Quod contra rationem juris receptum est, non est producendum ad consequentia.*

General Paper.

1. Trace the history of toleration as it appears in the Statute Book from the reign of Elizabeth to that of George the Second.

2. Give an account of the liberty of the Press, as it may be gathered from our State Trials, Debates in Parliament and Statutes, from the days of Elizabeth to Mr. Fox's Libel Act.

3. What was the exact ground of dispute between Charles the First and his Parliament with regard to the Militia?

4. By Marriage Articles it is agreed that a Freehold Estate shall be vested in trustees, upon trust for the intended husband for life, and after his decease for his first and other sons successively in tail male, with an ultimate trust in favour of his heirs—and it is further agreed that a Leasehold Estate shall be limited on the like trusts, so far as the rules of Law and Equity will permit. In what manner should this agreement be executed as regards the Leasehold Estate?

5. A. purchases stock in the name of himself and his wife; afterwards he by will gives the rents of his Real Property and the dividends of his Funded Property to his wife for her life, and, after her decease, the whole to his daughter, her heirs, executors, and administrators. On the decease of the testator, his widow claims an absolute interest in the Stock and a life interest in the Freeholds. Can this claim be supported?

6. A testator bequeaths a Casket of Jewels to A., and devises a Freehold Estate (worth £2000) to B. The testator has another Freehold Estate (worth £500), which does not pass by his will. His personal property, exclusive of the jewels, is worth £800. The jewels have been deposited in his lifetime as security for a simple contract debt of £1000. He owes at his decease £600 more, all to simple contract creditors: and his will contains pecuniary legacies to the amount of £100. Is A. entitled to have his legacy exonerated from the charge of £1000 to any and what extent?

7. A. finds in the secret drawer of a Bureau purchased by him at a Sale by Auction a purse of money, which he appropriates to his own use. Under what circumstances would he be guilty of larceny in so doing?

8. A. erects upon B.'s land} a house without licence so to do from B. Will B. be justified in entering the house by force, A. and his family being in it, and expelling them? Specify the leading cases which bear upon this question.

9. A. enters into a written contract with B., describing himself as agent for C., at the same time representing, and *bonâ-fide* believing, that he is duly authorized in that behalf. C. repudiates the contract on the ground that A. had no authority to act for

him in the matter. Will B, who is thus damnified, have any remedy, and if so in what form of action, against A.?

10. Explain the doctrine of Tenure, and show, concisely, how that doctrine has affected Estates in Land—1. In regard to enjoyment; 2. In regard to the modifications of ownership; 3. In regard to the forms of conveyance.

11. What was the probable design of the Statute of Uses? State some of the most important changes in the forms of Assurance effected by that statute.

12. Define a Contingent Remainder. Show how and by what means a Contingent Remainder might (before 1845) have been destroyed or preserved from destruction. What is the effect of the late statute with respect to the preservation of Contingent Remainders? Can you point out any Contingent Limitations which still require a device for their preservation, notwithstanding the statute lastly referred to?

13. How far must the external form of a Contract be regulated by the *lex loci contractus*?

14. What conditions must be satisfied in order that a sea may be *mare clausum*? In what actual instances are the conditions relaxed?

15. State generally the Roman Law on the subject of the obligation to pay Interest. What do you consider to be the principle which, in Roman Law, governs the rate of Discount?

ART. XVI.—COMMENTARIES ON ENGLISH LAW—
WHAT THEY ARE AND SHOULD BE.¹

THE theme here suggested is so vast that we cannot handle it in these pages as we might desire. To shew what Commentaries on English Law ought to be, would be well nigh as difficult as to write them. Some brief hints and suggestions may, however, not unprofitably be offered upon this subject.

Peculiar difficulties—in some measure, as we apprehend, insurmountable—present themselves full in face of any commentator on our law wishful to incorporate the text of Blackstone with his own, and thus, as it were, merely to amplify and adopt the old materials to a new fabric, or, at all events, to use them very freely in its construction. Now, this plan of commenting on law is objectionable for sundry reasons. No analogy drawn from the custom of architects or builders may here avail. The result must necessarily be patchwork, skilfully perchance disguised, but patchwork still. The massive and stupendous masonry of bygone years assorts but ill with the lighter, perchance more elegant, structure of to-day.

No writer incorporating his own commentary with the text of a standard author, has better succeeded than Mr. Serjeant Stephen in overcoming the difficulties of his task.

In the first place, the learned Serjeant's style is decidedly good; not indeed altogether similar or equal to Blackstone's, but yet vastly beyond that of the average of legal writers. The style of Sir W. Blackstone should certainly be studied by any one meaning to present himself to professional readers in the character of author; not at all with a view to imitation, for the style of our great commentator is essentially obsolete and out of date, but because his writings are framed on a classical model, and his mode of expressing himself is peculiarly lucid as well as dignified.

The second reason which occurs to us in justification of the

¹ New Commentaries on the Laws of England (partly founded on Blackstone), by HENRY JOHN STEPHEN, Serjeant-at-Law, Fourth Edition. London: Butterworths, 1858.

commendation above bestowed on Serjeant Stephen's general method and mode of treatment is this, that he certainly possesses abundant knowledge bearing on his subject.

Yet, even in regard to method and mode of treatment, we think we can detect some discrepancies caused by the learned Serjeant's adoption of Blackstone's work as the basis and groundwork of his own, which might readily have been avoided, or rather could scarcely have occurred, if our modern author had boldly come forward, and none would have charged him with presumption in thus doing, as an original commentator upon law.

Let us explain more fully what we mean : Sir William Blackstone's design in preparing his great work was this—to exhibit in pure and nervous phraseology a view of the body of our English law as existing in his day, vouching, as authorities, the older text-books, yet seldom descending to modern reports, and never collecting together and marshalling the cases which might have been cited in support of his positions. Serjeant Stephen, on the other hand, would seem to entertain a conviction, that reported cases may properly and successfully be cited even in elementary commentaries on the laws of England. And, accordingly, cases *are* cited by him *in notis* throughout his work, which, being selected with care and judgment, sustain and illustrate, though perhaps somewhat scantily, the leading passages in the text. Hence one dissimilarity between Serjeant Stephen's treatment and that of Blackstone.

Again, our readers are doubtless well aware that in "Stephen's Blackstone," passages retained without alteration from the older author are enclosed between brackets, so that the most careless and indifferent peruser of the work may at once discriminate between such portions of it as are due to Blackstone, and those which are ascribable to the learned Serjeant. We are not disposed to find fault, as some have done, with the method thus adopted of indicating the text of Blackstone ; it cannot, however, be denied, that the heterogeneous character of these volumes thus becomes prominently apparent, and the diverseness of the sources whence their component matter is drawn especially obvious.

Deeply impressed as we are with the ability of Mr. Serjeant Stephen, and appreciating the philosophic tone in which he

speaks—remembering, too, how admirably his learning in regard to real property has, for national purposes, been developed—we cannot refrain from recording our regret that he did not, at the very outset of his undertaking as a legal commentator, take a more independent and original line of action, and give in his own language—which is exceeding good—his own views—which are singularly just and accurate—touching the laws of England.

We have very little doubt that the idea above thrown out—it might seem perchance, though such an inference would be erroneous, without due consideration or reflection—in regard to the true mode of annotating our law, will, ere any long interval has elapsed, be fully carried out. The idea, when definitely stated, would be to write Commentaries upon the Laws of England entirely *de novo*—to exhibit in the text a selection of leading cases, culled from the modern as well as from the older reports, designed for the most part to illustrate our unwritten law, though occasionally suggestive of the true interpretation of our statute-book. The present moment would obviously be inopportune for the publication of such a work (which we apprehend could scarcely be compressed within less than four volumes), by reason of projected codification and the re-digesting of our criminal laws—not merely contemplated, but actually, to a very great extent, consummated and perfected. The work in question is, however, not the less a *desideratum*, which *must* be supplied ere our legal literature can pretend to vie with that of our transatlantic brethren, or with that of France or of some other Continental nations.

Unhappily, the rewards held out for stimulating professional literature are in this country so scanty, and success as a legal author, albeit so difficult of attainment, yet when attained seems, by some fatality, to operate so prejudicially for its possessor that we can scarce expect any one, at all competent, to devote himself to the task above hinted at, unless raised by the accidents of fortune above the necessity of mixing in forensic strife, and far out of the reach of those influences—emanating whence they may—which affect professional advancement. Noted instances present themselves of men, who have achieved the very highest stations which a career at the bar can lead to, coveting—and not

vainly—literary renown. And even from amongst those unblest by fortune's favours, or heedless of her frowns, some few may always be found who—feeling themselves to be above the beasts that perish—will reckon as something worth the praise accorded by contemporaries to literary merit or the hoped-for verdict of posterity. We accordingly in no degree despair of perusing ere long commentaries upon English Law such as we conceive they ought to be, and, *ad interim*, we are very well satisfied to peruse Mr. Serjeant Stephen's "New Commentaries," as here presented to us carefully and discreetly edited by his son.

To dilate upon the arrangement and contents of a work so well known and highly appreciated as that before us would be useless; we will, therefore, restrict our remarks to the fourth volume of it.

This volume deals mainly with the subjects of "Civil Injuries" and "Crimes," to which, however, is added a chapter on the "Rise, Progress, and Gradual Improvement of the Laws of England;" and lastly, that very important portion of a work of this nature—the index. To refer for one moment to this last point, we may observe that no one who has not either tried to make a good index, or who has not *been* tried in consulting a bad one, knows its real value. "If," said a learned writer, "I had unfortunately written or edited a bad, poor, or incomplete book, I would give no index, or a sham one. If, on the other hand, my work was what it ought to be, it should have a perfect index." A "perfect index" is the result of three things—a logical mind, an understanding of the subject-matter indexed, and careful labour equally spread over the whole field of sheets submitted to the process. The worth of an index is best discovered in its continual use, and we cannot pretend to have tried extensively the value of that belonging to the present edition; but as it is founded upon those of the previous editions, which are excellent, and judging from the casual tests and experiments we have applied to the present, we are willing to believe that the legal reader has had conferred on him the great boon of an available and sufficient index.

With respect to the book on Civil Injuries, Serjeant Stephen deserves the credit of having produced an excellent sketch of the proceedings and remedies in courts of equity, as well as those

of ecclesiastical, military, and maritime jurisdiction ; and the only comment which it is incumbent upon us to make on this part of the work is, that the student will hardly obtain elsewhere a better introduction to this department of the law than is here presented.

It is when we come to the next division of the subject, that of Crimes, that we see how much on the one hand has been done by the progress of knowledge, and how much on the other there yet remains to be done, to harmonize and consolidate the whole. The pages before us, perhaps, explain one of the chief difficulties which exist in regard to the amendment of our law ; for we see even now preserved from Blackstone's text, paragraphs upon obsolete crimes, such as apostasy, heresy, witchcraft, sorcery, &c., which induces us to reflect how far removed from common-sense and modern intelligence are the contents of many of the acts of parliament repealed and unrepealed ; yet how hard a task it has been found, and perhaps now is—considering the cherished prejudices of many powerful but foolish persons—to expunge antiquated nonsense from our statute-books. It is not always active opinion which obstructs improvement, but the dead weight and stolid immovability of mind operating to retard useful alterations ; or, indeed, long since we should have seen many absurdities and anomalies obliterated from our statute-book, and such a consolidation of our criminal law as would have rendered it more consistent with reason and the true theories of jurisprudence. Still, and notwithstanding the impediments which have long been thrown in the way of national reform, and the efforts to harmonize the laws of the land, we may regard what has been done with satisfaction, and what is now promised with hope.

There never seems to have been much difficulty, in days of old, in passing enactments relating to crimes. Savage retribution, by one part of the community upon another, in respect of real or supposed misdeeds, is a simple, though not always an efficacious, mode of legislative procedure. How the statute-book was wont to be constructed in earlier days after this fashion, we may infer from what is said at page seventy-six of the fourth volume of the work before us. "If bills," says the writer, "introductory of new penal enactments, were first referred to some of the learned judges

before they were entertained in Parliament, it is impossible that, in the eighteenth century, it could ever have been made a capital crime to break down, however maliciously, the mound of a fishpond whereby any fish should escape, or to cut down a cherry-tree in an orchard, as provided respectively by statutes 9 Geo. I., c. 22, and 31 Geo. II., c. 42. And were even a committee appointed, *but once in a hundred years*, to revise the criminal law, it could not have continued to this hour a capital felony to be seen for one month in the company of persons who call themselves, or are called, Egyptians, as provided by 1 Ph. and M., c. 4, and 5 Eliz., c. 20."

Whether the "judges" or a "committee" should be appointed to discharge the duties, as above proposed, in order to purge and protect the statute-book, we will not stop to inquire. *Some* competent body is required to save the new wine of our parliamentary rulers from being indiscriminately poured into the old bottles of their predecessors; and the ancient hose of the country gentry of George the Third's reign, from being patched with the new cloth of our modern legal manufacturers.

Upon the subject of criminal legislation, we will venture to cite the combined remarks of Sir W. Blackstone and Serjeant Stephen. This extract moreover will serve, to some extent, to illustrate the troublesome effect which we have referred to of two authors writing one paragraph. The passage runs as follows:—["In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded on principles that are permanent, uniform, and universal, and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind; though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern; and yet,] it is remarked by Sir W. Blackstone, [that either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; or from retaining the discordant political regulations which successive conquerors or factions have established

in the various revolutions of government; or from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or, lastly, from too hastily employing such means as are greatly disproportionable to their end, in order to check the progress of some very prevalent offence; from some, or from all of these causes, it hath happened that the criminal law is, in every country of Europe, more rude and imperfect than the civil.] And he observes, that [even with us in England, where our Crown law is, with justice, supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our trials are in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals against whom he can form no exception, nor even a personal dislike; even here we shall occasionally find room to remark some particulars that seem to want revision or amendment.] The justice of which complaints has been strikingly illustrated by the many signal reforms in the criminal law which, since his time, the legislature has found reason to introduce; and even now no candid commentator on our laws can pronounce a quite unmixed encomium on this part of our juridical system."

The last chapter of the last volume of these Commentaries is devoted, as we have mentioned, in accordance with the plan laid down by Blackstone, to the consideration of the "Progress of the Laws of England." The last-named writer, in the well-known eloquent conclusion of his work, in speaking of the English constitution, had said, "To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to Parliament. The protection of the liberty of Britain is a duty which they owe to themselves who enjoy it, to their ancestors who transmitted it down, and to their posterity who will claim at their hands this, the best birthright and noblest inheritance of mankind." And Serjeant Stephen thus terminates his reflections on the like subject:—"A clearer perception of the true nature of this enterprise, of the vast results to which it tends, and of the obligations by which we are bound to its advancement, has been

bestowed on the present generation than on any of its predecessors. May we not fail also to recollect, amidst the zeal inspired by such considerations, that the desire for social improvement degenerates, if not duly regulated, into a mere thirst for change; that the fluctuation of the law is itself a considerable evil; and that, however important may be the redress of its defects, we have a still dearer interest in the conservation of its existing excellencies."

Both of the above remarks are eloquent and true; but, as is frequently the case with true and eloquent remarks, the main difficulty is in applying them usefully. We will suggest one practical observation, assuming that the mind of the legislature is now pervaded by a just and earnest wish to preserve and reform in due proportions. What is most wanted, then, is a responsible person and a competent machinery to direct and utilize the efforts of the legislative. The Chancellor is not properly a minister of justice. The Attorney and Solicitor-General, with some splendid exceptions, are commonly overworked practitioners at the bar, whose business has been to ascertain what their branch of the law is, to support their own party when in office, and to look after government measures when requisite; and thus it happens that law-making in England is the result of the uncombined labour of amateurs; and we ought therefore, perhaps, to be grateful to Providence, that our law comes out not more inconsistent with itself, and incoherent, than we find it actually to be. When the next edition of the *Commentaries* appears, we hope that we may read in its last chapter something to the following effect:—

"Another great improvement which hath been made in the passing of laws affecting this great realm, consists in that wise arrangement resolved upon in the present reign of her most gracious Majesty—after the delay commonly experienced in determining on important and necessary measures laid before the high court of Parliament—I am alluding to the constitution of a competent legal board, presided over by a minister of justice, to which appertaineth the duty of watching over, and when need be of revising bills, prepared for the consideration of the legislature. The object thus sought to be obtained is, that crude and contradictory enactments should not be disseminated throughout

the statute-book, as heretofore, it must be confessed, hath lamentably been experienced.

“Henceforth the framing of the provisions by which the government of the united kingdom is to be affected, will no longer be remitted to chance, accident, or caprice, but confided to careful but constitutional supervision, and the scientific skill of competent persons.

“Moreover, important branches of the law have been consolidated, statutory language has been rendered intelligible, and the opprobrium of prolixity and inaccuracy, too often and too justly cast on our legislators, has been to a great extent happily removed.

Short Notes of Cases:

BEING A SELECTION

OF

ADJUDGED POINTS

REPORTED SINCE 1ST MAY, 1858.

POINTS DETERMINED IN THE COURT OF CHANCERY.

By O. D. TUDOR, Esq., Barrister.

COURTS.

REPORTERS.

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I.—POINTS DETERMINED IN THE COURT OF CHANCERY.

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1. HAYTER V. TUCKER. 4 K. & J., 243.

Charity—Mortmain Act (9 Geo. II., c. 36.)—Shares in Mining Companies conducted on Cost-Book Principle.

Shares belonging to certain mining companies on the cost-book principle, were vested in trustees for the purposes of the undertakings generally, and not in trust for the individual shareholders; and the interest of the shareholders was limited to the profits derived from working the mines. A shareholder bequeathed his residuary personal estate (consisting of his shares in the mining companies) to trustees, upon trust for a charity. It was held by Sir W. Page Wood, V. C., that the bequest was not as to the mining shares void, as being within the provisions of the statute of Mortmain (9 Geo. II. c. 36). After noticing *Bligh v. Brent* (2 Y. & C. Exch. Ca. 268), *Watson v. Spratley* (10 Exch. 222), and *Myers v. Perigal* (11. C. B. 90; 2 De G., Mac., & G., 599), his Honour said, "If I had found, in the case of any of the mining companies now in question, that the mine was vested in the purser or any other person in trust, not for the purposes of the undertaking generally, but for the individual adventurers in proportion to their shares, then I should have been bound to hold those shares to be an interest in land, within the meaning of the Mortmain Act; but if I find, as I do find in all the companies now in question, that the mines are vested in trustees for the purposes of the undertaking generally, and not in trust for the individual adventurers, no individual adventurer can call for any part of the soil, or any thing more than his share of the profits when realised; and if shares in such companies be given to a charity, it is clear, in like manner, that all the charity will ever be able to call for is a proportional part of the profits.

There is, therefore, no possibility of any violation of the Mortmain Law in the event of my holding that such shares can pass by will to a charity; and it is clear to me that, in the present case, the charity is entitled to the fund produced by the sale of the shares."

2. ALEXANDER V. BRAME 7 De G., Mac., & G., 525.

Charity—Mortmain Act—Covenant to pay a Sum of Money to a Charity.

A person, by instrument under seal, covenanted with trustees that he should in his lifetime, or his executors or administrators should, within twelve months after his decease, invest £60,000 in the names of the trustees, upon trust for certain charities. The instrument was executed by the covenantor, but was not communicated to the trustees. It was held by the Lords Justices that the instrument was a deed, whether testamentary or not, and, moreover, that it was not invalid, as being within the provisions of the Mortmain Act (9 Geo. II., c. 36), although it might be necessary to enforce the payment of money covenanted to be paid by resorting to the *real estate* of the covenantor. "It is plain," said Lord Justice Knight Bruce, "that for charitable purposes, such as those specified in the deed, the covenantor might well and effectually have made an immediate gift of money. It is plain, also, that for charitable purposes, for which a man may well and effectually make an immediate gift of money, he may, acting *bonâ fide*, make himself effectually a debtor of money by specialty without valuable consideration, and for motives merely of benevolence and beneficence; and it seems to me to follow and be manifest, that payment of a debt so incurred may, on behalf of the charity, be enforced against the debtor, and his real as well as his personal estate by the same means, to the same extent, and in the same manner as any other specialty debt fairly incurred, but not founded on valuable consideration. The statute 9 Geo. II., c. 36, cannot, I think, be deemed to have been intended to prevent or interfere with that.

"If in the present instance there had appeared to me sufficient ground for holding that the deed in question was a device on the part of the covenantor, for the purpose of evading and eluding the statute, by keeping seemingly and colourably clear of it, while meaning substantially to infringe it, I might very possibly have taken a view of this appeal favourable to the appellants; but whatever suspicions I may be disposed to entertain, there is not, in my opinion, judicial grounds for so holding. Entertaining, I cannot decline to act on the opinion, that the covenantor's assets, real and personal, are all liable under the disputed deed,

exactly as if its provisions had been in favour wholly of specified individuals, without any attempt at perpetuity, and without any intention or object of a public or charitable kind."

3. RE ROYAL BRITISH BANK. BROCKWELL'S CASE.

4 Drew, 205.

Contributory—Persons induced to take Shares in Company by Fraudulent Representations of Directors—Held not to be.

The directors of the Royal British Bank, when the company was in a totally insolvent state, prepared a report, which was presented at the annual meeting of the 2nd of February, 1855, totally misrepresenting the state of the company, in putting down as assets a large amount of bills, dishonoured and known to be hopeless, and otherwise representing the company as in possession of capital and flourishing, when in fact all, or nearly all, its capital had been wasted, and it was utterly insolvent. Mr. Brockwell saw this report at the office of the company, and took shares upon the faith of it. It was held by Sir R. T. Kindersley, V. C., that Mr. Brockwell was not properly made a contributory. "With regard to the law generally," said his Honour, "how far a person who takes shares on the faith of representations which are false, how would the matter stand if it were between individuals? If one person, by fraudulent representations, induces another to enter into a contract with him, the party making the false representation has, beyond all doubt, no right to enforce the contract. The party deceived may treat the contract as not binding. So that, suppose an individual carrying on a trade which is a losing concern, in which he has lost all his capital and is in debt, induces another to enter into partnership with him, by representing the business to be flourishing, and his capital to be entire, it is clear that he cannot insist on maintaining the partnership, or compel the person deceived to contribute to his losses. And so it would be if the false representations were made, not by the individual, but by his agent, even though that agent should not be expressly authorized to make the false representations.

"If such is the rule in the case of individuals, can it make any difference that the party making the representations is not a single individual, but a corporation?

* * * * *

"This, I think, is a clear rule to be drawn from the authorities. If a company make representations that are false, persons acting under them would not be bound. But if the representations are not by the company, but by individuals, not agents of the company, but strangers, a party misled by the representations to

become a partner, would, nevertheless, be bound to continue a partner.

"Now, I think the question in this case is settled by the House of Lords in the case of *The National Exchange Company* (2 Macqueen's Rep., 103). That case shews that a report made by the body of directors to the company, if it gets into circulation, must be considered as a report of the company."

His Honour then referred to the judgment of the Lord Chancellor, p. 125, and to that of Lord St. Leonards:—

"The authorities of these learned lords would be sufficient to guide me if I had any doubt; but I must say that, if it were requisite for me to lay down a rule, exclusive of authority, I should have no hesitation in arriving at the same conclusion."

4. ROBERTS V. CROFT. 24 Beav., 223.

Equitable Mortgage—Deposit of Part of Deeds—Subsequent Mortgage by Deposit of the Remainder—Priorities.

Roberts, a solicitor, deposited by way of equitable mortgage with Miss Willis, a client of his, some title-deeds of an estate to which he was entitled, omitting the conveyance to himself. This deed, together with another very old one, relating to the same property, Roberts afterwards deposited, also by way of equitable mortgage, with his bankers, Messrs. Bult. Neither Miss Willis (who employed no other solicitor) nor the Messrs. Bult inquired whether there were any other deeds, although, as to the deeds deposited with Miss Willis, they shewed no title in the depositor; and although, as to the deeds deposited with Messrs. Bult, the recitals in them referred to the deeds which had been deposited with Miss Willis. Sir John Romilly, M.R. (whose decision on appeal was affirmed by Lord Cranworth, C.), held, first, that in order to constitute a good equitable mortgage it is not necessary that the deeds deposited should shew a good title in the depositor; and, secondly, that as there was nothing to postpone Miss Willis, either on the ground of fraud or negligence, she was entitled to priority over the Messrs. Bult.

"If it be shewn," said his Honour, "that the deeds deposited *bonâ fide* relate to the property, that constitutes a good equitable mortgage, and priorities must depend on dates; for, otherwise, the court would have to determine which of the two deposits would shew the better title, a species of inquiry which it would be impossible to enter into with any chance of arriving at a satisfactory conclusion.

"I do not, therefore, consider the circumstance, that the title-deeds deposited with Miss Willis do not show Roberts's title to

the property, such as to disentitle her to the priority over Messrs. Bult.

"There was no fraud: was she guilty of such negligence as to disentitle her? All she did was, not to inquire for the subsequent deeds which created the title of Roberts. I admit the view taken by Mr. Goldsmid, that not having employed a solicitor she is to be treated in the same way as if she had employed one. But, on the other hand, what inquiry did Messrs. Bult make? They had deeds of 1768 and 1833, and there were several other intermediate deeds recited in the latter: did they make any inquiry after them? They knew there were various deeds between 1768 and 1826, and they made no inquiry as to what had become of them. On this ground, therefore, they and Miss Willis seem to stand on the same footing; if either had inquired, they would have received an answer that the deeds deposited were not all. I must assume they would have received the true answer if inquiry had been made."

5. MICKLETHWAIT V. MICKLETHWAIT. 1 De G. & Jc., 504.

Equitable Waste—Tenant for Life—Felling Ornamental Timber after Mansion has been pulled down by Settlor.

The testator in this case, who was tenant for life in possession, with an ultimate reversion to himself in fee (expectant on certain estates for life and in tail, which did not determine until after his death), left his mansion on the Beeston estate, and went to reside at Taverham, at the distance of about eight miles. He pulled down the mansion at Beeston, cut down some of the ornamental timber about it, turned the estate into a cover for game, and altogether acted so as to show that he had no intention that the mansion should be rebuilt. It was held by the Lords Justices that, as between the parties claiming under the will, the case stood on the same footing as if the testator had been entitled in fee simple in possession, and that the rest of what had been originally ornamental timber on the Beeston estate, was not, as between the parties claiming under the will, protected as ornamental, but might be cut by a tenant for life whose estate was without impeachment of waste.

"If," said Lord Justice Knight Bruce, "the protection of this timber as ornamental, or as having been planted or left standing for ornament, has not ceased, when or how is it to cease? If there had been proof, or we could infer that in demolishing, or after the demolition, of the Beeston house, the testator intended, designed, or wished to rebuild it, or to reside or erect a mansion-house or place of residence on that estate, or intended, designed,

or wished that any devisee under his will should do so, the plaintiff might have been entitled to protection for these trees, but there is no such case."

6. BUCKNELL v. BUCKNELL. 7. Ir. Ch. Rep., 130.

Husband and Wife—Agreement for Compromise of Suit against Husband for Adultery—Specific Performance.

A husband and wife were living separate, in consequence of adultery by the husband, and proceedings were about to be taken against him in the Consistorial Court for a divorce and alimony. A negotiation took place, the result of which was an agreement, which was carried out by two letters signed by the husband: one was directed to the wife's father, and by it the husband undertook to pay his wife £60 a year, half yearly, during the time they lived separate, and to pay her one-fourth of any gross sum he might enjoy from any permanent employment in his profession as an engineer. The other letter was directed to the husband's brother, on whose estate the husband had a charge, authorizing him to pay the £60 a year. It was held by the Master of the Rolls of Ireland, in a suit for specific performances by the wife and her father, first, that the agreement was in the nature of a family arrangement, and for sufficient consideration. Secondly, that as the husband and wife were separated at the time, the agreement was not contrary to the policy of the law, and might be enforced. Thirdly, that the agreement being binding as a personal contract to pay a separate maintenance, the court could enforce the payment, though there might be a remedy at law.

7. RE DON'S ESTATE. 4 DREW, 194.

Inheritance Act (3 & 4 Will. IV., c. 106)—Son of a Scotchman born previous to Marriage—not Legitimate as to Lands in England.

David Don, a domiciled Scotchman, had a son born in Scotland before marriage, and afterwards married the mother in Scotland. The son died seised of land in England, leaving his father surviving. It was held by Sir R. T. Kindersley, V. C., that the father could not inherit the land from his son. "The first question," said his Honour, "is with respect to the personal *status* of Don the younger as to his quality of legitimacy or illegitimacy; that is, was he the legitimate child of Don the elder? Does the law of England regard him as the legitimate son of his father? It appears to me that, on the authorities applicable to this question, the principal is this: that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the

country of his origin. If he is legitimate in his own country, then all other civilized countries, at least all Christian countries, recognise him as legitimate every where. Questions may arise, and have arisen, whether the law which is to determine the legitimacy or illegitimacy is the law of the country where the individual was born, or the law of the country where the parents intermarried, or the law of the country of the domicile of the parents? and if the domicile of the parents was different, whether the law of the father's or of the mother's domicile governs? If it were necessary for me to determine these questions, I should hold that the law of the father's domicile governed.—[His Honour referred on this point to *Munro v. Munro*, 7 Cl. & Fin., 843.]—In this case, Scotland was the country where both parents were domiciled, where the child was born, and in which the marriage took place. In Scotland, then, Don the younger was clearly a legitimate child; and in Scotland not only was he capable of taking personal estate, but he was capable of taking real estate by inheritance; and the rule of law is, that if he is legitimate according to the law of that country, his personal *status* here is that of a legitimate son. It would not however follow, that because he is a legitimate son, that he would according to the general law, irrespective of the Act of Parliament, inherit land in England of which his father had died seised. On the contrary, according to the law of this country, there are certain rules and canons of the law of inheritance as to real estate, which, irrespective of personal *status*, are annexed to the nature of real estate, and which would prevent Don the younger from inheriting. That question arose in the case so much commented on, of *Doe d. Birtwhistle v. Vardell*.—[His Honour stated the nature of that case, and proceeded.]—Now that case proceeds on this principle, that, admitting the legitimacy, more was required by the law; and that such are the rules of law as to real estate, as to preclude such a son from inheriting. Don the younger clearly could not, as the law stood before the Inheritance Act, although legitimate, have inherited land in England as heir to his father."

And, after elaborately examining the Inheritance Act, his Honour said—

"It appears to me that, upon the construction of this Act, I cannot find an intention to make any alteration of the law of inheritance, except in so far as the act has clearly expressed it. And, looking at the sixth section, I cannot find that it was the intention of the legislature, in that section, to affect the question as to the right an individual in the position of Don the younger to inherit or transmit inheritance; and, when I examined the particular language used, I find the word issue used in a sense

which, I think, confines it to issue capable of inheriting. There is no alteration, therefore, in the rule that precludes a person born out of wedlock from inheriting land, and precludes any person from inheriting from a person born out of wedlock."

8. SHAW v. NEALE. 6 H. L. Cas., 581.

Lien of Attorney for Costs.

Held by the House of Lords, overruling the case of *Barnesley v. Powell* (Amb. 102), that an attorney or solicitor had clearly no lien on an *estate* recovered for a client, in respect of the costs and expenses incurred in recovering it, as he has a lien *only on the papers* in his hands.

9. BELLAMY v. SABINE. 1 De G. & Jo., 566.

Lis pendens—Operation of, does not depend on the Equitable Doctrine of Notice.

In this case it was determined that *lis pendens*, although registered, is not notice to all the world of any equities which may subsist between co-defendants. All that is effected by a *lis pendens* is, that during the continuance of the suit neither party to the litigation can alienate the property so as to affect his opponent. In this case, F. Bellamy, the heir-at-law of E. Bellamy, filed a bill against John Bellamy and T. Sabine to impeach two agreements, one of which was for the sale of a life estate by J. Bellamy to E. Bellamy; and by the other, of which E. Bellamy had agreed to sell to Sabine the entire fee-simple, which accordingly was conveyed to Sabine by J. and E. Bellamy. After the institution of the suit, Sabine mortgaged the estate. The bill was dismissed as to the first agreement; but the second was set aside, and a decree made for a reconveyance by Sabine to F. Bellamy, on the terms of F. Bellamy making certain payments to Sabine. It was afterwards determined in another suit, on the strength of facts which appeared in the first suit, that J. Bellamy was entitled to a lien on the estate as against F. Bellamy and Sabine, for monies payable under the first agreement. It was held by the full court of appeal that the mortgagees not having, when they took their mortgage, any notice of the first suit, or of the circumstances on which J. Bellamy's claim was founded, were not affected on the ground of the pendency of the first suit by the claim of J. Bellamy; though, owing to the pendency of that suit, they were entitled as against J. Bellamy to no more than Sabine was entitled to.

10. BROOK v. BROOK. 3 Sm. & Giff, 481.

Marriage with a Deceased Wife's Sister—Invalid, though celebrated in a Country where the lex loci does not forbid it.

In this, a marriage had been celebrated in Denmark between an Englishman and a sister of his deceased wife. The parties were both domiciled in England, and had not any permanent residence in Denmark at the time of the marriage. It was held by Sir J. Stuart, V. C. (agreeing with the opinion of Mr. Justice Cresswell), that the marriage was void and null by the statute 5 & 6 Will. IV., c. 54; although, by the law of Denmark, marriages are permitted between persons so related by affinity.

"The law of England," said his Honour, "is wisely reluctant to admit any doctrine which is repugnant to the settled principles and policy of its own institutions. It is a settled principle of the law of England not to recognise or give effect to any contract illegal or immoral, or against public policy. This principle, so well established, is binding upon all English subjects, and imperative in all English courts of justice. The question of illegality, immorality, or contravention of public policy in such cases, is to be decided by the laws of England, and not by the laws of any foreign country.

"All the highest authorities among foreign jurists treat, as an exception from the principle of comity and respect due to foreign laws, the case of such foreign laws as interfere with the power and public policy of each state in its own municipal system. The parties to this marriage-contract were subjects of the crown of England, bound by their allegiance and domicile to the law and constitution of England. In Denmark they continued still subjects to the crown of England. In Denmark their status was that of aliens to the crown of Denmark, and owing only a temporary obedience to the laws of Denmark, under which they had only a temporary protection.

"The law of England, which prohibits the marriage of a widower with the sister of his deceased wife, is an integral part of our law and public policy. Therefore, by the established principles of international law, it must have a paramount effect, and cannot be evaded by having resort to the laws of any foreign country.

"The law of England as to this matter is a personal law, acting upon the persons of English subjects, and creating a personal incapacity, which must accompany the persons into every country. *Quando lex in personam dirigitur respicienda est ad leges illius civitatis quæ personam habet subjectam.* These are the words of Hertius, and they state a principle recognised by the other jurists.

"As a question on the law of contract, the validity of the contract of marriage as to the capacity to contract, must depend on the law of the country in which the contract was to have its effect, and that country was England. This is a case in which three circumstances concur; any one of which, according to the jurists, excludes the application of the *lex loci contractus*. It is a case in which the public policy of the law of England prohibits the contract. It is a case in which the law is personal in its nature, and must accompany the persons wherever they go. And it is, moreover, a case in which England was the country, with a view to which, and in which, the marriage contract was to have its permanent effect.

"No resort to the laws of Denmark, or of any other foreign country, can give validity to such a contract where the law of England has made it null and void."

11. PEARL v. DEACON. 1 De G. & Jo., 461.

Principal and Surety—Collateral Security—Destroyed by Creditor—Surety Discharged.

It has long been settled that where the creditor releases a security given by the debtor, he will thereby discharge the surety. In the above-mentioned case it was decided that the same result follows where the creditor, by his own act, destroys or takes away the subject-matter of the security. There, landlords advanced money to their tenant on the joint note of himself and a surety. Afterwards, they took a security for this and another sum advanced at the same time, by an assignment of furniture of the tenant, by way of mortgage. It was held by the Lords Justices, affirming the decision of Sir John Romilly, M.R., that by taking the furniture under a distress for rent in arrear, they discharged the surety. "It is clear," said Lord Justice Turner, "that the defendants (the landlords) could not have released the property comprised in that security without losing their remedy against the surety; and if they could not have released it, could they, by the exercise of a paramount right, destroy the benefit of it, after having taken upon themselves the obligation of preserving that benefit for the interest of the surety? I am of opinion that they could not; and that, having accepted the security, it was not competent for them to defeat the rights conferred by it."

12. BENWELL v. INNS. 24 Beav., 307.

Public Policy—Restraint of Trade.

A person engaged as a servant to a milkman in Charles Street, Grosvenor Square, agreed, amongst other things, not to carry on

or be concerned, as servant or master, in the like business, within the distance of three miles. It was held by Sir John Romilly, that he might be restrained by injunction from violating this agreement. "It is said," observed his Honour, "that the contract is void as an undue restriction of trade. If one, having a milk-walk of one mile in diameter, were to require a restriction far exceeding the limits of his walk, and there were no explanation of the necessity of such restriction, that might be an undue restriction of trade; but I am of opinion that this agreement was confined within reasonable limits."

13. *WHEATLEY V. COLLINS.* 7 De G., Mac., & G., 558.

Solicitor—Striking off the Rolls.

A solicitor having, without authority, instructed counsel to appear for parties interested in money in court, and to consent to its payment out of court, the Lords Justices ordered that he should be struck off the rolls of the court.

14. *THE GOVERNORS OF THE GREY COAT HOSPITAL V. THE WESTMINSTER IMPROVEMENT COMMISSIONERS.*

1 De G. & Jo., 531.

Vendor and Purchaser—Registered Judgment—Creditors—Concurrence of.

The plaintiffs contracted to sell freehold land to the defendants. The title was accepted by the defendants, who were let into possession; but part only of the lands was conveyed to them. The plaintiffs, in consequence of a large part of the purchase-money not having been paid to them, having filed a bill, obtained a decree against the defendants for sale of the property, and payment of the balance of the purchase-money out of the proceeds. It was held by the Lords Justices that a purchaser under the decree could not be compelled to complete, without the concurrence of the registered judgment creditors of the defendants, whose judgments were prior to the decree, and who were not parties to the suit.

"The statute," said Lord Justice Turner, "makes a registered judgment a direct charge on the estate, whether legal or equitable, which the debtor has in any land. Here the defendants had accepted the title of the plaintiffs, and so, before the commencement of the suit, had become the equitable owners of the land in question, subject only to the lien of the plaintiffs for the unpaid portion of the purchase-money. I am of opinion, that the requisition that the judgment creditors should release their interests in the property, or enter up satisfaction on their judg-

ments, is well founded. I do not say how the case would have stood if the title of the plaintiffs had never been accepted by the commissioners."

15. DIXON V. GAYFERE. 1 De G. & Jo., 655.

Vendor and Purchaser—Vendor's Lien for Annuity.

A agreed to purchase an estate from B, and, upon the estate being conveyed, to grant a life annuity to B, *to be secured by bond*. It was held by Lord Cranworth (affirming the decision of Sir John Romilly, M.R.), that B had no lien for the payment of the annuity, but was entitled (the purchaser being dead, and there having been no conveyance) to have the annuity secured by a valid and effectual bond, before he could be called upon to convey the estate.

16. VINEY V. CHAPLIN. 4 Drew., 237.

Vendor and Purchaser—Right of Purchaser to pay Purchase-money to Vendor only—and to choose his own Attesting Witness.

Sir R. T. Kindersley, V. C., in the above-mentioned case, held that a purchaser has a right to have the execution of the conveyance attested by a witness of his own choosing, and he has also a right to insist upon paying the purchase-money into the hands of the vendor only. "If A," said his Honour, "owes money to B, he has a right to pay it to B, and to no one else. Even where there is a written authority, the purchaser runs a certain amount, trifling no doubt, but still some amount of risk. But when he is asked by a mere verbal message, though in this case apparently a servant, to pay to another person, surely there is risk. It is not merely the risk that the person receiving the money may be dishonest, but whether he can prove the authority. Suppose the creditor dies, and his executors, who know nothing about it, except that the money has not been received, bring an action. What will the debtor have to do? Why, he must of course prove that there was an authority given by the deceased creditor. I do not say positively how it would be where there is a power of attorney; but even there, if the debtor does not pay to the attorney, who would bring the action? not the attorney but the principal. Now, if a power of attorney not only authorizes, but compels, the debtor to pay to the attorney, it is the attorney who ought to have the right of action. If the attorney can say—'Not only you may, but you shall pay to me,' why cannot he bring the action? But no one ever heard of such an action. But, at any rate, if there is not a power of attorney, as a strict

rule the debtor has a right to say—‘I will pay to my creditor, and to no one else.’ I do not say he has a right to make the creditor come to him to be paid, but he has a right to go to him.”

17. PARR V. LOVEGROVE. 4 Drew, 170.

*Vendor and Purchaser—Title when Shown—Seisin—Proof of—
Inspection of Deeds.*

With regard to what is meant by the common decree, “when a good title is shown,” Sir R. T. Kindersley, V. C., said—“The first inquiry, whether a good title can be made, means not only that the vendor shows on his abstract such documents and facts, that if the documents are produced and the facts proved he has a good title, but that the vendor has shewn that he can produce the documents and prove the facts; but as to the second branch of the inquiry, it means, when was a good title first shown on the abstract; and if, on the face of the abstract or abstracts delivered, the vendor has shown say a sixty years’ title, and if, for the purpose of supporting that title, it is necessary to show that such a person died intestate, or any other fact, if the facts are alleged with sufficient specification in the abstract, then that abstract *shows* a good title, although the proof of the matters shown may be the subject of ulterior investigation, and no authority has been cited to show that that is not the meaning of the decree.”

In the above-mentioned case the title, more than sixty years old, commenced by a general devise. A deed more than sixty years old recited the seisin of the devisor; it was held that that, coupled with the continued possession, was sufficient evidence of seisin.

“I find,” said his Honour, “that in some books of practice it is suggested that an abstract ought to begin with a deed, and not with a will containing merely a general devise; and it is urged that even a specific devise is not an eligible root of title. But there is no authority to show that a title must begin with a deed, or a will, by which the fee-simple of the property specifically described must be vested in somebody. And, on the other hand, Lord St. Leonards says, ‘you may even make a title without any deeds at all.’ Therefore, I do not think that the title can be considered to be bad on that ground alone. But if the title does commence with such a document as we have in this case, there must be sufficient evidence of seisin. Now it appears to me that, taking the deed coupled with the continued enjoyment from that time downwards, there is sufficient evidence of seisin to constitute a good title.”

With regard to the proof that a person died intestate, he thought that, as a vendor is bound to produce the best evidence reasonably within his reach, "he was in strictness bound to produce evidence of a search in the Bishops' Court or the Prerogative Court," in which, if he had made a will, or if his estate had been administered to, the probate or the letters of administration would have been found.

With regard to the question whether the purchaser had a right to have inspection, and therefore production, of any deeds that were in the vendor's possession, *although they were of an earlier date than the earliest deeds abstracted*, his Honour made the following observations:—"It is singular that on that proposition also there is no direct authority. It appears to be the opinion of Mr. Jarman and Mr. Hayes, that it is the right of the purchaser to see any deeds to the property that are not abstracted, although the abstract may show a good sixty years' title. Whether that is so or not, as a general rule I must say, that, considering the nature of this title, it is in this case the right of the purchaser.

"Here the abstract does not commence by a conveyance showing the fee to be in the person who is the root of the title, nor even by a devise in fee of the specific property, but only a general devise.

"It is only by the collateral evidence shewing seisin and continued possession, that you can arrive at the conclusion that there is a good sixty years' title. In a case like this, I think it just that the purchaser should have a right to inspect any earlier deeds in the possession of the vendor.

"The question arises here particularly as to two deeds scheduled to the deed of covenant of 1790; viz., a lease and release of 1752, and the chirograph of a fine.

"As to those *primâ facie*, they would be in the possession of the vendor. It is said at the bar that they are not; but whether they are or not is not in evidence: if they are, the purchaser has a right to see them."

18. ROCHE V. HARDING. 7 Ir. Ch. Rep., 338.

Will—Legacy—Priority.

As a general rule, all legacies must on a deficiency of assets abate rateably, and the *onus* lies upon a person seeking priority to make out that such priority was intended by the testator. In the above-mentioned case a testatrix bequeathed a legacy of £750 to H, which she directed should be paid and realized by him in the first instance, without any delay or reduction, immediately after her decease. The testatrix then added, "and

after payment of the above, I then make the following bequest : I give to Sarah M. and Susan M. £200 each." The testatrix then bequeathed to R £250 ; "and in case the full amount of interest due to her from F should be recovered, she left R a further sum of £200 in addition," and she appointed R her sole executor. It was held by the Master of the Rolls of Ireland, that the legacy to H should not have priority, but should, on a deficiency of assets, abate rateably with the other legacies. After referring to the cases of *Miller v. Huddleston* (3 Mac. & G., 521), *Brown v. Brown* (1 Keen, 275), *Thwaites v. Foreman* (1 Coll., 409), *Beeston v. Booth* (4 Madd., 168), *Ashburnham v. Ashburnham* (16 Sim., 186), *Lord Dunboyne v. Bradford* (18 Beav., 313), *Clarke v. Sewell* (3 Ath., 106), and *Blower v. Moret* (2 Ves., 420), his Honour made the following observations :—

"The cases to which I have referred establish, first, that the direction that the legacy to Joseph Robert Harding should be paid in the first instance, gives no priority ; secondly, that the words 'without any delay,' and 'immediately after my decease,' in the bequest, gives no priority, as the former words can have no more effect than the word 'immediately,' which Lord Hardwicke considered gave no priority. So also the words, 'after payment of the above, I then make the following bequest,' give no priority, according to the cases referred to ; and the Master's decision is therefore clearly right, unless the words, 'without any deduction,' gives priority to Mr. Joseph Robert Harding.

"The authorities establish clearly, 'that the presumption of equality is not to be repelled by ambiguous expressions.' Sir John Leach so states in *Beeston v. Booth*. Now the words, 'without any deduction,' would be fully satisfied by holding that the legacy was to be free from legacy duty. The objections, however, raise no point that the legacy to Joseph Robert Harding was free from legacy duty. The only question I have to decide is, whether those words unambiguously show that a testatrix who is, according to the cases, to be presumed not to have contemplated a deficiency of assets, intended to give a preference to that legacy."

19. RE THE ST. GEORGE'S BUILDING SOCIETY. 4 Drew, 154.

Winding-up Acts—Benefit Building Societies within.

Sir R. T. Kindersley, V. C., held in this case, that a benefit building society of the ordinary kind, certified under the 6 & 7 Will, IV., c. 32, is within the winding-up acts 1848 and 1849.

II.—POINTS DETERMINED IN THE COURTS OF COMMON LAW.

COURTS.	REPORTS.
Queen's Bench	7 Ellis and Bl., Part 4.
Common Pleas	{ 2 Common Bench, N. S., Part 6. 3 Common Bench, N. S., Part 1.
Exchequer	{ 3 Exchequer, Hurlstone and Nor- man, Part 1.

1. Action against Carrier—Payment to Agent of Consignor. 2. Liability of Principal for Act of General Agent. 3. Contract of Sale—When is Property so appropriated as to Pass to the Vendee? 4. Liability of Licensed Victuallers—Stats. 9 Geo. IV., c. 61, and 18 & 19 Vict., c. 118. 5. Interrogatories—What Interrogatories will be allowed under Stat. 17 & 18 Vict., c. 125, s. 51. 6. Selling Goods distrained before the Expiration of the Five Days—Excessive Distress. 7. *Habeas Corpus*. 8. Guarantee—Joint, or Joint and Several Covenant—Joinder of Parties. 9. Sanity of Testator—Nature of Presumption respecting it. 10. Slander—Measure of Damages.

1. COOMBS V. THE BRISTOL AND EXETER RAILWAY COMPANY. 3 H. & N., 1.

Action against Carrier—Payment to Agent of Consignor.

The point in this case is very simple; we mention it merely because Railway Companies, assailed with litigation on every side, ought to know the law as it affects them. The action was here brought against the defendants to recover damages for the loss of goods, which had been delivered to them for carriage by the plaintiff. The defendants pleaded that the said goods were delivered to them by, and were received by them from, one A, to be carried from Exeter to Bristol, and at Bristol to be delivered to the plaintiff; and that the said goods having been accidentally lost, and the said A, as the consignor thereof, having claimed from the defendants compensation for such loss, the defendants, before action brought, paid to him as such consignor, and the said A accepted from them, a large sum of money, as the full value of the said goods, in satisfaction and discharge of the said claim. The plea further averred that the defendants had not, either at the time of the delivery and acceptance of the said goods, or afterwards, down to and at the time of the payment aforesaid, notice, either from the plaintiff or otherwise, that the said A, in

delivering the said goods for carriage, was acting as agent for the plaintiff; and that the payment aforesaid was made by the defendants in the *bonâ fide* belief that the said goods were delivered to them by A on his own account, and that he was the person entitled to claim and receive satisfaction for the loss thereof.

On demurrer to the above plea, it was held bad upon this ground: "The plaintiff," said Bramwell, B, "states that the contract was made with him, and that the defendants have broken it; the defendants do not deny that, but only say that some one who delivered the goods to them claimed compensation, and they paid him."

2. SUMMERS V. SOLOMON. 7 Ell. & Bl., 879.

Liability of Principal for Act of General Agent.

This case may be added to the long list of decisions indicating the liability of a principal in respect of the contract of his general agent. The principle illustrated by this case will sufficiently appear from the remarks of Mr. Justice Crompton, thus reported:—

"It was laid down in very early times, that one instance of authorizing an agent to pledge the employer's credit, was enough to justify a party dealing with the employer in assuming that the authority continued As soon as you have given the agent authority to pledge your credit, you render yourself liable to parties who have acted upon notice of such authority, until you find the means of giving them notice that the authority is determined."

3. ALDRIGE V. JOHNSON. 7 Ell. & Bl., 885.

Contract of Sale—When is Property so appropriated as to Pass to the Vendee?

This case will aid in illustrating the doctrine of our law as to the appropriation of property, and the question—When will chattel property pass to the vendee, without actual delivery of it into his hand? The action was brought by a corn merchant for the detention and conversion by the defendant of certain barley, purchased, as alleged by the plaintiff, off K, whose assignee in bankruptcy the defendant was, and detained and converted by the defendant. From the evidence, it appeared that the plaintiff had inspected and approved of the barley in bulk, he had sent his own sacks to be filled out of that bulk, and had assented *a priori* to a portion of the barley in bulk being thus set apart for and appropriated to him, and had subsequently demanded it.

K, after filling certain of the sacks, had wrongfully mixed their contents with the residue of the grain. And it was held that the property in some portion of the barley having thus passed to the plaintiff, could not be divested out of him by the tortious act of the vendor.

4. REG. V. WHITELEY. 3 H. & N., 143.

Liability of Licensed Victuallers—Stats. 9 Geo. IV., c. 61, and 18 & 19 Vict., c. 118.

This was an information laid under the stat. 9 Geo. IV., c. 61, the 13th section whereof gives the form of licence to be granted to an innkeeper under that act, containing a *proviso* in these words—"And do not keep open his or her house, except for the reception of travellers, nor permit or suffer any beer, or other exciseable liquor, to be consumed from, or out of his (or her) premises during the *usual hours of the morning and afternoon divine service, in the church or chapel of the parish or place in which his or her house is situated*, on Sundays, Christmas-day, or Good Fridays."

The information charged the defendant, innkeeper of L., with having on a certain day, being Sunday, "wilfully kept open his house and premises, wherein he was licensed to sell beer and spirits by retail, for the reception of persons not being travellers, during the usual hours of the afternoon divine service of the church there situate, to wit, between the hours of half-past two and three o'clock in the afternoon of the same day, contrary to the tenor of his licence, and to the statute in that case made and provided. It was admitted that the service at the L. church commences at half-past two, and that the defendant had his house open and customers therein, not being travellers, between half-past two and three o'clock. The question was, whether the defendant's liabilities as an innkeeper must be regarded as regulated by the statute of Geo. IV., or by the 18 & 19 Vict., c. 118, which prohibits the sale of beer, wine, or spirits, on Sundays between the hours of *three and five o'clock*, and after eleven o'clock in the afternoon. This question was decided by the Court of Exchequer in favour of the defendant, and in opposition to the view taken by a majority of the justices at petty sessions; the conviction being quashed accordingly.

5. MOOR V. ROBERTS. 2. Com. B. Rep., N. S., 672.

Interrogatories—What Interrogatories will be Allowed under Stat. 17 & 18 Vict., c. 125. s. 51.

The nature of the interrogatories which will be allowed under the above statutory clause, will sufficiently appear from the

following observations of two learned judges of the Court of Common Pleas in the above case:—

“The obvious intention,” remarked Cockburn, C. J., “of the 51st section of the C. L. Proc. Act, 1854, was to supersede the necessity of recourse being had in all cases to a Court of Equity, for the purpose of aiding by discovery the proceedings in an action at common law, and to give the courts of common law power to afford the same sort of assistance to suitors there. But we must consider what was the object of the act, and we shall find it to have been this:—That where either party has a case, but the materials for proving it are not in his own possession, or under his own control, but in the possession of his adversary, he should be enabled to interrogate his adversary, in order to establish his own case. But the statute clearly was not meant to apply so as to enable one party, by means of interrogatories, to discover how the other intends to shape his own case, and to see whether there are any defects in it which he may avail himself of.” And to these observations Cresswell, J., adds—“There is undoubtedly considerable difficulty in drawing the line in each case between what interrogatories ought and what ought not to be allowed. But it seems to me that all those which are proposed in this case fall within one or other of three classes. First, where the defendant is seeking to discover the plaintiff’s case—which cannot be allowed; Secondly, where the interrogatories are what are called fishing interrogatories, thrown out for the chance of getting hold of some fact or admission which might help the defendant’s case; Thirdly, where the proposed interrogatories have a tendency to contradict a written document.” If the proposed interrogatories fall within any one of the three classes thus succinctly specified, they will clearly not be allowed, or need not be answered.

To the above case, although abstracted in our last Number, p. 201, it was thought desirable, on account of its practical importance, briefly to revert.

6. LUCAS v. TARLETON. 3 H. & N., 116.

Selling Goods distrained before the Expiration of the Five Days—Excessive Distress.

The declaration in this case contained two counts; first, for that the defendant wrongfully, and contrary to the statute in such case made, sold certain goods under distress towards satisfaction of the rent for which they had been distrained, and the charges of the said distress, appraisement, and sale, without having left at the chief mansion-house, or other most notorious place of the said premises, charged with the said rent distrained for, any notice of

the said distress, and of the cause of such taking, five clear days before the appraisement and sale of the said goods, as required by the said statute ; and wrongfully sold the said goods, as aforesaid, before the expiration of five days after the said distress taken, and notice thereof left at the chief mansion-house, or other most notorious place on the said premises, contrary to the said statute.

The second count of the declaration charged, that before the grievances, &c., a messuage and land at, &c., were held and occupied by virtue of a certain tenancy under the defendant at, and under a certain rent payable to the defendant, and the defendant distrained for certain rent then due to him, for and in respect of the said messuage and land, the plaintiff's goods, that is to say, &c. ; and the same being of much greater value than the said rent then due to the defendant, and the charges of the said distress and appraisement and sale thereof, when at the time of taking the said distress, a small part of the said goods was of sufficient value to satisfy the said rent and charges, and the defendant thereby took an excessive and unreasonable distress for the said rent, contrary to the statute.

Upon "not guilty" pleaded to these counts, and issue joined thereon, evidence was given at the trial under the first count to shew, that the goods in question had in fact been sold a day too soon ; but no proof was adduced that the plaintiff had sustained any damage thereby—the Judge accordingly directed a verdict for the defendant in respect of the issue raised upon this count, and the court *in banc* held this ruling to have been correct.

In reference to the second count in the declaration above set forth, a point was taken, though not decided, of this kind, that under it the plaintiff might shew that the defendant had distrained for more rent than was due, in order to make out that the distress was excessive—the plaintiff's evidence shewing that the amount distrained for was £80 and costs, whereas £70 only was really due as rent from the plaintiff to the defendant.

7. EX-PARTE COBBETT. 3 H. & N., 155.

Habeas Corpus.

In this case the Court of Exchequer held that a plaintiff in a suit pending in that court, being in lawful custody as a prisoner for debt, is not entitled, *as of right*, to a writ of *habeas corpus* to bring him up to conduct his cause at the trial. "If," remarked the court, "his evidence be necessary in an action brought by him, he has as much right to a writ of *habeas corpus*, *ad testificandum*, to procure his attendance as a witness in his own suit,

as if he were applying for it to bring up any other witness," but he cannot have a *habeas corpus*, as of right, to enable him to conduct his case.

8. PUGH v. STRINGFIELD. 3 Com. Bench (N. S.), 2.

Guarantee—Joint, or Joint and Several Covenant—Joinder of Parties.

This was an action upon a guarantee, affirming and illustrating the rule as to the joinder of parties laid down in *Eccleston v. Clipsham*, 1 Wms. Saund., 153, and the notes appended thereto; viz., that although a covenant be in terms joint and several, yet if the interest and cause of action be joint, all the covenantees must join in suing on the covenant.

9. SUTTON v. SADLER. 3 Com. Bench (N. S.), 87.

Sanity of Testator—Nature of Presumption respecting it.

Presumptions are divisible into three classes: 1. Presumptions of law, which are altogether artificial. 2. Presumptions of law and fact, which are of a mixed character. 3. Natural presumptions, or presumptions of mere fact.

The case *supra* shows that the presumption of a testator's sanity is not to be treated as a merely artificial or legal presumption, "but at the utmost as a presumption of law and fact; that is, an inference to be made by a jury from the absence of evidence to show that a party does not enjoy that soundness which experience shows to be the general condition of the human mind. But in such cases, when evidence is laid before a jury, they must decide according to what they believe to be the truth; and where a will is set up as a valid will, a jury ought not to pronounce it to be so, unless they are convinced of the affirmative." * * * "If indeed a will, not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will; and if the party opposing the will gives some evidence of incompetence, the jury may, nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the will: and in each case the presumption in favour of competency would prevail. But that is not a mere presumption of law; and, when the whole matter is before the jury on evidence given on both sides, they ought not to affirm that a document is the will of a competent testator, unless they believe that it really is so."

10. HIGHMORE V. EARL AND COUNTESS OF HARRINGTON. .
3 Com. Bench (N. S.), 142.

Slander—Measure of Damages.

This was an action for slanderous words spoken by the female defendant of the plaintiff, a beneficed clergyman, imputing to him immoral conduct, evidenced *inter alia* by alleged undue familiarity with a female servant, and by misappropriation of money collected at the offertory. There was conflicting evidence in the case, and a verdict for the plaintiff, with damages £750, was found by the jury. The court *in banc* refused to grant a new trial on the ground that the damages were excessive, intimating an opinion that, in such cases, juries are in general hardly liberal enough in awarding damages.

Short Notes of New Books.

[*.* All Law Books and works of interest to the Legal Profession, forwarded to the Editor of the LAW MAGAZINE and LAW REVIEW, will be noticed—either shortly, or at length—in its pages.]

A Treatise on the Specific Performance of Contracts, including those of Public Companies. By Edward Fry, of Lincoln's Inn, Esq., B.A. Barrister-at-Law. London: Butterworths, 1858.

THE above Treatise, as its author explains in his preface, differs from the well-known works of Lord St. Leonards and Mr. Dart, in that the latter discuss the contract of sale of real Estate, and all the relations thence arising, so that the doctrine of specific performance is treated of only as *one mode* in which that contract is enforced; while Mr. Fry directs his efforts primarily to the subject of specific performance; and he deals with the general question of contract of sale, only so far as it requires attention, as *one* of the contracts which the court enforces. In the Equity Procedure Bill of the Solicitor-General, which is now pending in Parliament, there is a clause, one of the objects of which is to give to the Court of Equity the power of awarding damages to the party injured, either in addition to, or in substitution for, injunction or specific performance. When this measure is carried, it will be of essential improvement in the procedure in Courts of Equity. At p. 346 of the volume before us, the author has some pertinent remarks on this subject.

Mr. Fry's elaborate Essay seems to exhaust the subject, on which he has cited and brought to bear with great diligence some 1500 cases, which include those of the latest reports.

Law and Practice in Appeals from Scotland to the House of Lords. By Thomas S. Paton, Advocate. Edinburgh: T. and T. Clark. London: Stevens and Norton, 1858.

THE author of the work, the title of which is above given, observes, upon the authority of Mr. Maddox, that for the king to sit in his own judicature is "conformable to the practices of all nations since the days of King Solomon;" and further, as to the antiquity of appeal, he records that it "is certain that St. Paul was brought before King Agrippa, and from *him appealed to Cæsar*." Quite independent of these two valuable historical events, the right of appeal to the House of Lords from Scotch tribunals, exists both at common law and under various statutes, the provisions whereof Mr. Paton has duly noted in his present volume.

The Legal Guide for Residents in France. By W. A. S. Westoby, Esq., M.A., of Lincoln's Inn, Barrister-at-Law. Paris : A. Durand. London : Longman & Co.

MR. WESTOBY has rendered essential service to those of our countrymen whom fate or fancy has driven to the sunny land of France. It is an exceedingly awkward thing for any one to be ignorant of the laws of the country in which he happens to dwell. Mr. Grantley Berkeley, for example, *more suo*, "punched the head" of a cabman at Havre, and the consequences were, as he narrates, exceedingly inconvenient to him; and in respect of what our great commentator calls in his important classification the "Rights of Persons," and "the Rights of Things," it is the duty, as well as the interest, of residents in a foreign land to acquaint themselves with their rights and liabilities. This they can do well enough now with Mr. Westoby's aid. We may further remark, that a view of the character and practical workings of the Code Napoleon may be read with great advantage in this volume, by the student curious in such matter.

The Wills of British Subjects made Abroad; or, Rules for the Guidance of English Residents on the Continent in the Execution of their Wills. By W. A. Westoby, Esq., M.A., &c. Paris : A. Durand. London : Longmans, 1858.

THE title of the little pamphlet sufficiently explains its character. It is distinct and clear in its information, and is calculated to be useful to a numerous class of readers.

A Manual for Articled Clerks. Eighth Edition. By F. T. S. Wharton, Esq., M.A., &c. London : Butterworths, 1858.

THIS volume is addressed to the numerous candidates for admission on the rolls of our courts. It contains a digest of all the examination questions which have been used heretofore, and may very probably be found useful by those who wish to test their knowledge of the subjects in which they have, by proper study, endeavoured to prepare themselves.

An Elementary View of the Proceedings in a Suit in Equity, with an Appendix of Forms. By Silvester J. Hunter, Esq., Barrister-at-Law. London : Butterworths, 1858.

THIS little work is confined entirely to the practice connected with a suit in Equity; our author expressly disclaims the idea of expatiating on the nature of equitable rights, and he does so, as we think, wisely, referring his readers generally to various well-known treatises for information upon that subject. The aim of Mr. Hunter, who recently distinguished himself by obtaining a studentship at the Bar Examination, in preparing the volume before us, has been, we presume, to extend to the Equity student similar facilities for mastering the details of procedure in Chancery, to those which have long since been afforded to the Common

Law student, for familiarizing himself with the practice of our courts at Westminster, by Mr. Smith's admirably planned and well executed Elementary View of an Action at Law; and, so far as we can judge from glancing at these pages, we think that their author has conscientiously performed his task. No doubt a habit is creeping in, somewhat to be reprobated, of rushing prematurely into print, and striving to attain the honours of professional authorship before the experience and knowledge requisite for acquiring them, and holding them unchallenged, *can* by possibility have been gained. The evil nevertheless here hinted at, is less prominent where an author, who has but recently been called to the degree of barrister, restricts his efforts solely to the production of an elementary work, designed for educational purposes, and exhibiting, it is to be supposed, explanatory statements and suggestions with reference to difficulties encountered by the writer during his own novitiate, and overcome. Adopting the view above taken respecting the special aim and design of the volume on our table, we think it likely to prove beneficial.

Reports of Cases decided in the High Court of Admiralty of England, and on Appeal to the Privy Council, commencing Michaelmas Term 1855. By M. C. Merttins Swabey, D.C.L. London: Butterworths.

SINCE the cessation of Dr. Spence's reports in the summer of 1855, there have been no authentic reports of the decisions of the Court of Admiralty. This would be an intelligible loss under all circumstances; but the loss in the present instance is the more serious, that we have thus lost the benefit of the judgments of Dr. Lushington, arising out of the Merchant Shipping Act 1854.

The present reports supply this *lacuna*, and contain in addition many important decisions upon the power of the court over maritime funds, the extent of its decrees, &c. Upon the subject of the Merchant Shipping Act, we call the reader's attention to the cases of the General de Caen, the Fenix, the Caledonia, and a host of others, as illustrating the operation of the 296th, 297th, 298th, 388th, and 460th sections of that act.

The Clara, the Clyde, the Calypso, and others, elucidate the peculiar character of the court, and its manner of dealing with its cases; and upon other questions of maritime law there are well-considered decisions of great interest and importance.

The law of the Admiralty, as it now stands, is so emphatically a law of modern creation and growth, that the deficiency of reports of the successive decisions in that court, to which we referred, has been a serious inconvenience to the mercantile public and to the profession.

The present publication supplies the missing reports from November 1855, to December 1856; and the very valuable nature of its contents, and the excellent manner in which the judgments are prefaced, as well as reported, will make it a most acceptable addition to every law library—the more particularly on the passing of Mr. Warren's bill.

A Treatise on the Law relating to Sea Lights and the Rule of the Road at Sea. By Frederic Thomas Pratt, D.C.L., Advocate, Doctors' Commons. London: Stevens & Norton, 1858.

THE immense amount of shipping which now ploughs its way through every known part of the ocean, evidently requires some code of laws for its governance whilst floating on the waters. But the great modern difficulty consists in the diversity of locomotive power: steam vessels having so much greater facility for both getting in and out of the way than the ancient winged ship. It became necessary, therefore, to lay down and maintain certain stringent regulations for the purpose of avoiding collisions. It is to this class of regulations which Dr. Pratt has addressed himself. The volume is necessarily a technical one, and addressed to a circumscribed class of readers; but it seems eminently adapted for their use and perusal.

The Practical Conveyancer. By Rolla Rouse, Esq., Barrister-at-Law. London: Butterworths, 1858.

As the first edition of this work has been already favourably noticed in our pages, and as the opinion respecting it then expressed has been verified by the fact above announced, that a second edition of it has just appeared, we think we may, on this occasion, content ourselves with intimating that Mr. Rouse's collection of Precedents in Conveyancing has now been rendered more complete, by inserting in it Forms of Settlements, together with a general and full form designed to aid in the preparation of Separation Deeds; that the work has been materially enlarged—expanded, indeed, into two volumes; and that the references have throughout been carefully verified and tested.

We entertain no sort of doubt that "The Practical Conveyancer" will, in its present improved form, be acceptable to, and appreciated by, the profession.

The Magisterial Synopsis, a Practical Guide for Magistrates, their Clerks, Attorneys, and Constables, in all matters out of Quarter-Sessions, containing Summary Convictions and Indictable Offences, with their Penalties, Punishment, Procedure, &c., tabularly arranged.

By George C. Oke. Sixth Edition. London: Butterworths, 1858.

AFTER the lapse of little more than a year, we are again invited to peruse a new edition of this very useful and valuable synopsis. "During the last year," says the author in his preface, "the additions to and alterations in magisterial law have been few but important. Amongst the statutes may be mentioned the 20 and 21 Vict. c. 43, enabling dissatisfied parties to call upon, and justices to state, a case for the opinion of a superior court on questions of law arising in summary proceedings;" also "the 20 & 21 Vict. c. 3, altering the terms of penal servitude for indictable offences." Both of these statutes are accordingly expounded in the present edition, and many other improvements have been made in it, adding not inconsiderably to its worth. The book cannot fail of being highly and generally esteemed.

Events of the Quarter.

MISCELLANEOUS.

PROCEEDINGS IN PARLIAMENT WITH REFERENCE TO LEGAL MATTERS.

It has, as our readers are well aware, been officially announced that Sir F. Kelly, the present very able and experienced Attorney-General, has in preparation a measure for consolidating the law of Insolvency, of a broad and comprehensive character; so comprehensive, indeed, that some surmise it will embrace all that portion of our Statute-Book which concerns the relation of debtor and creditor. The above measure, of which intimation has been given by the Government, and also that under the charge of Lord John Russell, have resulted from, and indeed arisen immediately out of, the important meeting of the Association for the Promotion of Social Science, held at Birmingham in the month of October last. One consequence of that gathering was the appointment of a committee of delegates from the leading Chambers of Commerce throughout the country, under whose auspices was framed the bill (for materially amending and re consolidating the law of bankruptcy), subsequently brought, by the noble lord just named, into the House of Commons. The views of this committee were, moreover, fully communicated to the present Attorney-General; and, there can be little doubt, will be yet further considered and discussed at the ensuing annual meeting of the National Association, which is to be held at Liverpool in October next.

Under the circumstances just stated, a postponement of Lord Brougham's measures, for amending the law of bankruptcy and insolvency, has been deemed necessary and unavoidable. It would manifestly have been preposterous for the noble and learned lord to have attempted to proceed with two bills, professedly confined to remedying the evils principally complained of in the departments of law just specified, at a time when the whole law bearing on bankruptcy and insolvency was undergoing revision and reconstruction. These bills related, first, to imprisonment for debt and insolvency, giving such enlarged powers to the Bankruptcy Courts as might reach insolvents of all classes, whether traders or non-traders; and next to such an alteration of the bankruptcy jurisdiction as should remove the mischief so justly complained of, which arises from the distance that creditors have to travel for redress.

A third bill of very great importance was postponed in deference to the Lord Chief-Justice's opinion, that its subject ought to be fully discussed, both by the profession and the public, during the recess—the extension of Lord Brougham's act of 1851, for the examination of

parties to criminal proceedings. There was, in our last number, a full discussion of this subject; and it is certain that there is none more deserving the deliberate consideration both of the legislature and the public.

The bill for securing the independence of Parliament, one of those presented by him in 1845, has been postponed, because there was a bill then on its way to the House of Lords from the Commons, and which there seemed every reason to expect would pass the latter House, as it had been supported by the Government—a bill abolishing entirely the freedom of members of Parliament from arrest for debt. Lord Brougham's bill only extended the act of 1812 from bankrupts to insolvents generally. It seemed therefore clear, that no further proceeding ought to be had in it while the larger measure was passing. However, that has now been, with others, abandoned for this year. But this relinquishment has only taken place within the last few days.

We look forward earnestly to the Parliamentary session of 1859, for the effecting of most important amendments in our law, having reference to the various matters above enumerated. And confident we avow ourselves that much and beneficial progress will then be made towards the consummation aimed at by the three eminent individuals particularized in the preceding paragraphs, if party strife, and the turmoil created by a lust of place and power, be so far calmed and tranquillized as to allow of questions of a purely practical nature being ventilated and discussed.

To Lord Brougham, to Lord John Russell, and to the learned Attorney-General, a grateful recognition of services freely rendered in advancing measures of such great and genuine utility, is already due from the community at large.

Lord Lifford asked in the House of Lords, on May 3rd, a question relating to the unsatisfactory working of the Chief Clerks' offices of the Court of Chancery; which he said he "believed, from the testimony of the legal profession, was working unsatisfactorily; indeed, following fast on that road on which the Masters' offices travelled and expired." Lord Chelmsford is reported to have rejoined in a somewhat curiously worded fashion. *First*, that though he had made "some little inquiry" upon the subject, he "had not been able to obtain much information." *Secondly*, he affirmed that "there was not a general impression that the business in chambers was conducted in an unsatisfactory manner." *Thirdly*, "that he did not see that any further steps could be taken for expediting causes in Chancery."

Lord Cranworth took the same view as the Lord Chancellor, alleging that, if the abuses mentioned by Lord Lifford "were not altogether without foundation, they were immensely exaggerated." Lord St. Leonards, however, made some practical remarks during the debate, which alone renders it valuable and worthy of notice in our pages. "The present establishment," said the noble Lord, "was

sufficient to transact satisfactorily the whole business of the country ;" but he warned their lordships against "expecting too much from the Chief Clerks, who were never intended to perform all the duties formerly discharged by the Masters." There ought to be no long speeches in chambers, it was observed, nor ought contentious matter to be disposed of there. "The existing system was a new one, and as such would require the constant supervision of the higher power of the court. . . . The only proper mode of performing judicial business was to take up a cause and never leave it until it was finished."

On the subject of this debate, we cannot here dilate ; it is one, however, which has been left in no creditable condition. Some responsible person is wanted to look after legal evils, whether well established, or as they rapidly grow.

The offices of the Masters of the common-law courts are, we may also remark, choked with references and judicial business, which, because inconvenient for transaction in court, it is assumed can be conveniently poured down on the Masters. In this case, as in that of the Courts of Equity, the "supervision" spoken of by Lord St. Leonards is required.*

The bill of the present Solicitor-General, with respect to procedure in the Courts of Chancery, is a very important measure ; and, as is frequently the case with important measures, attracts comparatively little attention, being obscured by others of greater interest to party.

In the House of Commons, at an early stage of the session, Mr. Warren stated that "it was his intention, according to the course that might be taken by the government, either to move for a committee to inquire into the matter, or to take an early opportunity of bringing in a bill with the view to open the Court of Probate generally to the bar, and to open the Court of Admiralty to the profession generally, both members of the bar, and attorneys and solicitors." Accordingly a bill has been brought in by the learned member just named ; but that seemed after all not to be directed against the main mischief—that of the present exclusion of the bar from the greater part of the business of the Court of Probate. Mr. Warren has, however, in the House of Commons redeemed his promise, by procuring a clause to be inserted in the Probate Court Amendment Act, which, if it be retained, will accomplish his object.

If that be a bad law which is based on doubtful principle, is habitually disregarded, is fruitful in disputes and domestic evils—then Lord Lyndhurst's Act, relating to the marriage with a deceased wife's sister, is entitled to be enrolled among mischievous and impolitic examples of modern legislature. This Act has been again the subject of debate in the House of Commons, on a bill introduced by Lord Bury (May 6th). Again was the vexatious spectacle exhibited of honourable members trying to interpret the Scriptures to the House. Quotations from bishops, priests, and deacons, blue-books, commissions, and many other invaluable authorities, were made—for the twentieth time—the only novel-

* See last Number of *Law Magazine and Review*, p. 115.

ty being that an hon. member gravely suggested, that it was the duty of the government to solve the question by "issuing a commission to Hebrew scholars to ascertain the true construction of the disputed texts of the Old Testament." Now it happens very fortunately for the purpose of meeting the novel and intelligent proposition, that by a curious series of parliamentary manœuvres professors of the Jewish creed (versed peradventure in the Hebrew tongue) may henceforth gain access to our houses of legislature, and lend their aid in expounding to Lord Derby or Lord Palmerston the true signification of the Books of Moses, the Prophecies, and the Talmud.

Our readers are well aware by what process of self-stultification the House of Lords has "provided means" for Jews to enter the legislative houses, and it will be more respectful to that august assembly to make no comments thereon.

The marriage bill is now floundering in the Upper House,* and whether it will pass this session depends a good deal upon the amount of business to be done, and other legislative accidents. Amongst the latter may be mentioned what is called the "spirit of concession," which signifies retaining prejudices and repeating fallacies to the last; but, nevertheless, *acting* upon antagonistic opinions. This will probably, as on the Jew question, cause the bill eventually to become law.

A bill brought forward by Mr. M'Mahon, having for its object the granting of new trials in criminal cases, although it found considerable favour in the House of Commons, has not been persisted in.

APPOINTMENTS, &c.

Mr. Justice Coleridge having determined to resign, at the close of the past term, the judicial office on the Queen's Bench which he has so usefully and honourably held for three-and-twenty years, the occasion was taken by the bar to bid him formally farewell. As the address which the learned judge made in reply to the attorney-general is of more than common value, we think that it is well to record it in our pages. After the attorney-general had expressed on the part of the bar their feelings of esteem and regard for his lordship, and their regret at losing him from among them, Mr. Justice Coleridge spoke as follows :—"Mr. Attorney-General and Gentlemen of the Bar, accept my heartfelt thanks for this most gratifying testimony of your regard. I wish I could feel that what has been said is as strictly just as it is abundantly kind. But, although this cannot be, I will not deny myself the pleasure of believing that, to some extent, I have earned the good opinion and affection of the Bar. I should be ungrateful, indeed, if I doubted the sincerity of such a succession of kind testimonies as have attended me in every step of my career. This, gentlemen, the close of the whole, will be remembered by me as long as I live, and it is a great comfort to me at this trying moment—for, gentlemen, you can well believe that I am under the excitement

* It has been thrown out since the above was written.—*Ed. L. M. & R.*

of conflicting feelings. I have taken the resolution of retiring before I was compelled to do so by sickness, infirmity, or incapacity ; and that step has not been hastily taken. Her Majesty has been pleased to summon me to her Privy Council, which will give me still some occasional judicial employment, and I do not think it right to shrink from any opportunity of being useful, according to my strength and ability ; but still I look forward to simple rest, a desire not unnatural at my time of life, and after so many years of labour ; and I contemplate a return to those pursuits which were the delight of my youth, but which I find to be incompatible with due attention to my profession. But, with all these circumstances in my mind, I may be excused for saying that it is a solemn thought, that I shall find it difficult to give up the habits and break off the associations of nearly forty years, which I may find have become, as it were, a part of my very nature. It is a solemn thought that I have come to the end of my professional career, and that the responsibility of that judicial career now rises up before me at a moment when no neglect of duty can be amended, and no breach of duty can be repaired. This moment, too, recalls that long list of associates with whom I have laboured within these walls, and whom, in the course of nature, I must expect before long to follow. Gentlemen, I assure you it is a sad thought that I am to part with you. I well recollect with what misgiving I took my seat on this bench. I was told that favourable hopes were entertained of me, but I knew well how imperfect was my experience. False modesty would be out of place now, but I believe there are few men to whom the judge's office does not present great difficulties. I felt them then, and I feel them now ; but both at first and at last I felt that I could rely on the learning, industry, and ability of the Bar. Nothing more lightened my labours than their uniform kindness. I very early learned, that if a judge would be simple and patient, candid and considerate, and without respect of persons, he would reach every honest heart, and would be certain of such encouragement and co-operation from the Bar as would lessen his difficulties and strengthen him to overcome them. With this conviction I have gone on, hopeful and rejoicing ; and without being wholly deserving, and yet not wholly unworthy of it, I have always received kindness at your hands. I know not how I could have laboured for so many years without it ; and for that kindness I shall be deeply grateful as long as I live. It would argue a want of feeling to suppose that in so many years I have not given some just cause of offence. If, then, there be any one among you now present whom I have injured by word or look, by weariness or impatience, to him I now express my most sincere sorrow, and heartily desire his forgiveness. Gentlemen, I will not detain you with a single remark upon the greatness or importance of your profession. So long as England is rich and free, the law must always exercise a predominant influence. I am sure you feel your responsibility is commensurate with your interest ; and I have no fear but that, in any political difficulties or dangers that may arise, you will be found, as your predecessors were, courageous, and entirely

equal to any crisis. But the most insidious dangers are those which beset you in your daily business—the excitement of controversy, the desire of victory, the love of intellectual display, and the excessive sense of duty to your clients. Gentlemen, and especially my younger friends, suffer me to put you on your guard. We can well afford to bear with broad pleasantries, but we cannot afford that our professional standard of honour should be questioned, or that it should be said that we would do as advocates in court what as gentlemen we should scorn to do. Sometimes we lend support to this notion by the ease with which we attribute ungentlemanly conduct to one another. That client is dear indeed that would induce an advocate, in carrying out his views, to go beyond his great and glorious profession. Forgive me, my friends, these free words. I speak in the love of a profession to which I have given the best part of my years, and which I shall continue to love as long as my heart shall beat. I have detained you too long, but I must not close without tendering my thanks to the Masters of the court. The world knows little of their unostentatious services; but you know them, and the judges know them by daily experience, and I gladly seize this opportunity of thanking them for their conscientious discharge of their duties to the suitors. Nor can I leave without pronouncing my regard for those with whom I have so long occupied this bench. I have indeed been a happy man in my colleagues. Every member of the court but myself has been changed. With those who have departed, as well as with those who have succeeded, I have lived in peace and harmony—loving and honouring them, and I trust loved and honoured by them, certainly guided and encouraged—with so much of general agreement as served to give authority to our judgments, but with so much occasional difference as showed our individual responsibility and independence. Thus employed in court, out of court we have lived in that easy, happy intercourse which sweetens the toils of office, and makes men more fit to be fellow-labourers. I may have said too much. My successor is known, and the undoubtedly wise choice leaves no cause for regret. I trust he may preside as long and happily, and more efficiently than I have; but I hope that in your happy meetings you will bear in mind that I do desire long to be remembered here. And now, Mr. Attorney-General, Gentlemen of the Bar, and Masters, my dear Lord, and Brethren, earnestly, gratefully, and affectionately, I bid you all farewell, and may God bless you.”

Mr. Hugh Hill, late of the Northern Circuit, has succeeded to the judicial seat on the Queen's Bench thus vacated by Mr. Justice Coleridge. Mr. Hill was called to the bar in 1841.

The rank of Queen's Counsel, in the county palatine of Lancaster, has been conferred on Mr. Sowler of the Northern Circuit.

On the 11th of May, 1858, William Payne of Gray's Inn, Esquire, was called to the degree of Sergeant at Law.

On the 17th of May, John Cross of Gray's Inn, Esquire, and John Tozer of Lincoln's Inn, Esquire; and on the 20th of May, Charles Petersdorff of the Inner Temple, Esquire, received the like preferment. The new scale of costs of prosecutions having been found objec-

tionable, and the subject being a very important one, letters patent have been granted to the Right Honourable Edward Cardwell; William Miles, Esq.; William Deedes, Esq.; Edward Christopher Eger-ton, Esq.; William Nathaniel Massey, Esq.; William Henry Walton, Esq.; Robert Marshall Straight, Esq.; Robert Upperton, Esq.; and Acton Tindal, Esq.; appointing them Her Majesty's Commissioners to inquire into the costs of prosecutions generally, and also into the fees payable to clerks of the peace and clerks to justices, allowances to constables, and expenses of coroners' inquests.

It is understood that no successor to the late Mr. Richard Stevenson, one of the commissioners of the Liverpool court of bankruptcy, will be nominated.

The death of the Lord Justice-Clerk Hope has deprived the Scotch courts of the services of a laborious and energetic judge. Mr. John Inglis, one of the most able, accomplished, and successful lawyers in Scotland, succeeds to the above office, and to the Presidency of the Second Division of the Court of Session in Scotland. He is also appointed to be one of the Senators of the College of Justice.

Charles Baillie, Esq., succeeds Mr. Inglis as Lord Advocate, and Mr. David Mure is appointed Solicitor-General for Scotland.

The Queen has also been pleased to nominate Charles Neaves, Esq. (one of the lords of session), to be one of the Lords of Justiciary in Scotland, in the room of Robert Handyside, Esq., deceased.

James Moncreiff, Esq., M.P., has been chosen Dean of the Faculty of Advocates.

COLONIAL APPOINTMENTS.—Alexander James Johnston, Esq., has been appointed to be one of the Puisne Judges of the Supreme Court of the Colony of New Zealand; William Blanc, Esq., to be Her Majesty's Attorney-General for the Island of Dominica; and Thomas Johnson, Esq., to be Registrar of Deeds for Her Majesty's settlements in the River Gambia.

CALLS TO THE BAR.

Easter Term 1858 (April 30.)

INNER TEMPLE.—Charles Arbuthnot Holmes, B.A. (holder of the studentship awarded in Michaelmas Term, 1855); Richard Lewis de Capell Brooke, M.A.; Robert George Wyndham Herbert, B.C.L.; Edward Bullock; Francis David Longe, B.A.; John Rankine Black, B.A.; Richard Henry Stackhouse Vyvyan, and Francis Wilson, Esqs.

LINCOLN'S INN.—The under-mentioned gentlemen were this day called to the degree of Barrister-at-law by the Hon. Society of Lincoln's Inn, viz:—Frederick Morton Eden, M.A., Oxford; Charles Saunders Wheelley, LL.B., Cambridge; Arthur Carr Walford, B.A., Cambridge; Edward Gilbert Highton, B.A., Cambridge; Charles Arthur Turner, M.A., Oxford; Charles Booth, M.A., Cambridge; Thomas Burtt, B.A., Cambridge; John Edward White, B.C.L., Oxford; and John Cook, Esq.

MIDDLE TEMPLE.—The under-mentioned gentlemen have been called to the degree of the Outer Bar by the Hon. Society of the Middle Temple, and were published in the Middle Temple Hall this day:—Eugène Jules Leclézio; John Morgan Howard; Thomas Richardson Kemp, B.A., Trinity-hall, Cambridge; William Atkin; Edward Hutchinson Pollard; Richard Fitzgerald Glaister; Francois Joachim John Rouillard, and Walter Blackett Trevelyan, B.A., Gonville and Caius College, Cambridge, Esqs.

Trinity Term, 1858 (June 7.)

INNER TEMPLE.—John Millage Putnam, B.A.; William Henry Butler, B.A.; Richard Lomax, LL.B.; Hugh John Marcus Williams, B.A.; Francis Fitzroy, B.A.; Alfred Bonham Carter; Thomas Roberts, M.A.; Thomas Vallance; John Vincent Leach; Harvey Darrell Stewart; and Charles Henry Dashwood, Esqs.

MIDDLE TEMPLE.—Morris Simeon Oppenheim, Certificate of Honour of the First Class, awarded by the Council of Legal Education; John Baker Greene, Certificate of Honour of the First Class, awarded by the Council of Legal Education, A.B., M.B., Trinity College, Dublin; John Wilcoxon Ruth; William Bruce; John Anderson Fawns; William Charles Wentworth; Richard Oliverson of Exeter College, Oxford, M.A.; Samuel Pope; and John Connon, Esqs.

LINCOLN'S INN.—Henry Carne Oats, LL.B., London (Certificate of Honour of the First Class); William Stratford Dugdale, jun., M.A., Oxford; Edward Lloyd, B.A., Cambridge; George Sidney Read, M.A., Oxford; Vincent Thomas Thompson, M.A., Cambridge; Owen William Lloyd, B.A., Cambridge; Charles James Fife Stuart; Arthur Kekewich, M.A., Oxford; Thomas Edward Howe, M.A., Oxford; William Griffith, B.A., Cambridge; Francis Worge Duke; Charles Campbell; George Frederick Nell, S.C.L., Cambridge; Samuel Hawksley Burbury, M.A., Cambridge; Charles William Upton, M.A., Cambridge; Richard Jones, jun., B.A., London; George Hudson, jun., B.A., Oxford; James Price Beck, B.A., Oxford; Daniel Connor Lathbury, B.A., Oxford; and Leonard Henry Courtney, B.A., Cambridge, Esqs.

EXAMINATION OF STUDENTS OF THE INNS OF COURT.

PRIZES AWARDED.

At the public Examination of the Students of the Inns of Court, held at Lincoln's Inn Hall, on the 19th, 20th, and 21st May, 1858, the Council of Legal Education awarded to—

Albert G. Langley, Esq., student of the Middle Temple, a Studentship of Fifty Guineas per Annum, to continue for a period of Three Years.

Charles A. Russell, Esq., student of Lincoln's Inn, and Henry S. Page Winterbotham, Esq., student of Lincoln's Inn, Certificates of Honour of the First Class.

W. Young Clare, Esq., student of the Inner Temple ; Leonard Henry Courtney, Esq., student of Lincoln's Inn ; Samuel Hawksley Burbury, Esq., student of Lincoln's Inn ; Charles W. Blakiston Houston, Esq., student of Lincoln's Inn ; Francis Fitzroy, Esq., student of the Inner Temple ; George Sidney Read, Esq., student of Lincoln's Inn ; Daniel C. Lathbury, Esq., student of Lincoln's Inn ; Robert Thomas Forster, Esq., student of Lincoln's Inn ; John Fraser, Esq., student of the Middle Temple ; William S. Shoobridge, Esq., student of Lincoln's Inn ; John Huish, Esq., student of the Middle Temple ; and Charles Campbell, Esq., student of Lincoln's Inn—Certificates that they have satisfactorily passed a Public Examination.

NECROLOGY.*April.*

- 11th. WHEELER, Wykeham, Esq., solicitor, aged 29.
- 24th. PALMER, William, Esq., Barrister-at-law, of the Inner Temple, aged 56.
- 25th. SUDLOW, J. J., Esq., solicitor, aged 70.
- 27th. DODSON, The Right Hon. Sir John, late Dean of the Arches, &c., &c., Benchers of the Middle Temple, aged 78.
- 27th. BARWIS, George, Esq., solicitor.
- 28th. ADAMS, Alfred, Esq., solicitor, aged 36.
- 28th. PATERSON, William, Esq., solicitor, aged 72.

May.

- 6th. BIRD, Charles, Esq., Barrister-at-law, aged 83.
- 7th. KING, David, Esq., solicitor, aged 43.
- 8th. DOUGLAS, Greenhill Daniel, Esq., solicitor, aged 24.
- 12th. HAMILTON, Thornton G., Esq., Barrister-at-law, aged 27.
- 17th. SPINKS, John, Esq., solicitor, aged 50.
- 19th. BENSON, Robert, Esq., solicitor, aged 51.
- 26th. POLLOCK, Joseph, Esq., late Judge of the County Court of Liverpool, aged 47.

June.

- 7th. **ADES**, William, Esq., late Clerk of the Peace for the County of Rutland.
11th. **POLLOCK**, Kennett George, Esq., aged 47.
14th. **HOPE**, The Right Hon. J., Lord Justice-Clerk of the High Court of Justiciary, Edinburgh, aged 64.
20th. **BEESON**, Webb Vere Charles, Esq., solicitor, aged 62.
22nd. **HARVEY**, Nathaniel, Esq., Town Clerk of Campbelton, aged 81.
27th. **BRIDGMAN**, Vicary John, Esq., solicitor, aged 47.
28th. **SIPSCOMB**, Lancelot, Esq., solicitor, aged 71.

July.

- 2nd. **CUTLER**, Frederick, Esq., late of Furnival's Inn, aged 59.
4th. **EDWARDS**, John Francis, Esq., solicitor, aged 28.
12th. **Elgie**, F. T., Esq., Solicitor, Worcester, aged 43.
15th. **Dearsley**, H. R., Esq., of the Northern Circuit.
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List of New Publications.

Ayckbourn—The Practice of the High Court of Chancery, as altered by recent Statutes and Orders, and by the Abolition of the Master's Office; with Practical Directions, and a Copious Selection of the Modern Cases. The Sixth Edition. By H. Ayckbourn, Solicitor. 12mo, 16s. cloth.

Ayckbourn—Terms of Practical Proceedings in the High Court of Chancery, with the Orders of the Court, Rules and Regulations, from Michaelmas Term, 1849, to Trinity Term, 1858. Forming the Second Volume of the Practice of the Court. By H. Ayckbourn, Solicitor. 12mo, 10s. cloth.

Broom—A Selection of Legal Maxims, Classified and Illustrated, by Herbert Broom, M.A., Barrister, Reader in Common Law to the Inns of Court. Third Edition. 8vo, 26s. cloth.

Chalmers—Opinions of Eminent Lawyers on various points of English Jurisprudence, chiefly concerning the Colonies, Fisheries, and Commerce of Great Britain. A New Edition. Royal 8vo, 25s. cloth.

Davidson—Precedents and Forms in Conveyancing. By C. Davidson, T. C. Wright, and J. Waley, Esquires, Barristers. Second Edition, Volume II., Part 2. Royal 8vo, 28s. cloth.

Fry—A Treatise on the Specific Performance of Contracts, including those of Public Companies. By Edward Fry, B.A., of Lincoln's Inn, Esq., Barrister-at-Law. 8vo, 16s. cloth.

Goodwin—The Practice of Probate and Administration under 20 & 21 Vict., c. 77, with the Statute and an Appendix, containing the Rules and Orders issued by the Court of Probate, and the Tables of Fees. By C. W. Goodwin, Esq., Barrister. 12mo, 7s. 6d. cloth.

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